

The impact of the principle of non-refoulement on the Dublin Regulation and the Asylum Procedures Directive as adopted by the European Union

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Deadline: 31 May 2006

Words in Total 19.490

26.05.2006

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Acknowledgements

This Master Thesis is the product of two years of studies. With colleagues from all around the world, interesting seminars and challenging readings it has been a true joy to participate in this program. I am proud of my accomplishment and I am thankful to those who made it possible. The expertise and insight my always-friendly supervisor Vigdis Vevstad shared with me has been invaluable. The patience and unselfishness of my life-companion has been admirable. The never-ending support I have received from my parents has been beyond what words can describe.

Abstract

In the last decades the international community has witnessed large-scale movements of people across international borders. Common for most States are that they desire a smooth and effective system, which can offer both protection of refugees as well as decrease irregular migration. All Member States of the EU are sovereign States, free to design and implement their own legislation, as long as it is in compliance with their international obligations. One imperative obligation is to respect and protect the principle of non-refoulement. This principle is regarded as a cornerstone in refugee protection and an absolute rule within the human rights regime and belongs to customary international law.

In recent years, the body of asylum law within the European Union has developed progressively. The legal analysis conducted in this thesis, regarding the Dublin Regulation and the Asylum Procedures Directive, established within the framework of CEAS, has proven that the necessary safeguards essential to the protection of refugees, and, in particular, to the principle of non-refoulement, are strikingly absent.

Abbreviations

AI	Amnesty International
CEAS	Common European Asylum System
IDP	Internally Displaced Person
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
NGO	Non Governmental Organisation
OAU	Organization of African Unity
UNCAT	United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations

1. Introduction

1.1 Purpose

In the last decades the international community has witnessed large-scale movements of people across international borders. Some people are forced to flee their home and some are searching for better life-conditions. No matter the reason, today, refugees and irregular movements of people are important issues for governments around the world and pressing themes on the political agendas. As most States strive for a smooth and effective system, that can offer both protection of refugees as well as decrease irregular migration, both unilateral as well as bilateral agreements are reached between governments.

This thesis will examine some elements of the laws that have been developed as part of the area of Justice, Freedom and Security of the European Union. It is this area that will be of most importance to this thesis and specific parts of the legislation regarding asylum laws will be analysed in connection with international obligations assumed by the Member States of the European Union. In Part I, the first stage of this study, the non-refoulement principle, regarded as a fundamental part of refugee protection as it was created to protect the life and freedom of refugees, will be presented. According to public international law, this principle shall prevent States from sending a person, or a group of people, from their own territory back to a state in which they are likely to face persecution or in which they might be subject to torture, cruel, inhuman and degrading treatment or punishment. The second step, Part II, of this thesis will analyse whether the laws passed by the European Union comply with those international obligations assumed by its Member States and, above all, if those laws comply with the principle of non-refoulement. As the aim of this study is to establish whether the specific elements of the laws passed by the European Union might cause its Member States to violate the principle of non-refoulement, a legal analysis will be conducted.

In recent years, the body of asylum law within the European Union has developed progressively. The potential impact of these laws on the life of refugees is important as the European Union is often considered a role model by countries outside its borders. If we allow the standard of refugee protection in the European Union to deteriorate, we might face a similar decline around the world. It should be emphasised that the legislation of the European Union must not be in contradiction to international refugee and human rights law as its

Member States have assumed to respect, protect and fulfil human rights through various treaties, conventions and practises. Specifically, all Member States have signed and ratified the 1951 Convention relating to the Status of Refugees, making it crucial to analyse what this obligation implies.

1.2 Methodology

In order to establish whether the laws and regulations of the European Union are in compliance with the international laws protecting refugees and, above all, with the principle of non-refoulement, a legal analysis, based on sources of international law, shall be carried out. In Part I, the nature of the principle of non-refoulement will be established. This will be achieved by an examination of legal sources, both at the international level as well as at the regional levels, thus, it becomes inevitable to look at the interpretation of the non-refoulement principle made by the European Court of Human Rights. In Part II, the focus will shift towards the newly adopted laws of the European Union. The focal point of the legislation will be the Council Regulation Establishing the Criteria and Mechanisms for Determining the Member State responsible for examining an asylum application lodged in one of the Member States¹ (hereinafter the Dublin Regulation, see Appendix I) and the Council Directive on the Minimum standards on procedures in Member States for granting and withdrawing refugee status² (hereinafter the Asylum Procedures Directive, see Appendix II).

Those two instruments must be considered in the context of the international obligations assumed by Members States of the European Union, and in particular, it will be considered whether these two instruments are in compliance with the principle of non-refoulement.

1.3 Limitations

In addition to affecting 25 countries and 457 million citizens, the development of laws and regulations within the European Union has been rapid and embraces many fields. Following the presentation of the applicable public international law, a specific aspect, to be precise, the codification of the so-called “third countries” in the Dublin Regulation and in the Asylum Procedures Directive will be considered with regard to the principle of non-refoulement. The instruments of the Common European Asylum System (hereinafter CEAS) regulate a number of issues but focus will be on the parts regulating the use of “third countries”. To review non-

¹ Establishing the Criteria and Mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003a) Official Journal L 050, 25/02/2003 P. 0001 – 0010. See Appendix I.

² Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Official Journal L 326, 13/12/2005 P. 0013 - 0034. See Appendix II

legal arguments, including for example, the impact of political, economic and social considerations may be of significance, however, this will be left for another discussion, as the entire focus will be on the legal aspects. In addition to the 1951 Convention relating to the Status of Refugees, the relevant body of law on international human rights, to which the Member States of the European Union are bound, will also be reviewed, thus ensuring a thorough legal argument. In both international criminal law and in the laws regulating war, the principle of non-refoulement is present, for this paper neither will be of relevance and therefore not examined.

1.4 Definition and concepts

The United Nations High Commissioner of Refugees (hereinafter the UNHCR) call for a clear definition on the terminology concerning so-called “third countries”; i.e. there should be a clear distinction between a First Country of Asylum, a Safe Third Country and a Safe Country of Origin.³

However, it is important to point out that in various articles and documents, the concepts are often used interchangeably, which might at times be confusing to the reader. Sometimes only “third countries” are mentioned; this may refer to the First Country of Asylum, the Safe Third Country or the Safe Country of Origin. For the purpose of this thesis, the concepts as suggested by Stephen H. Legomsky⁴ will be employed. Accordingly, a First Country of Asylum will be described as a country in which the asylum applicant has received some kind of protection before he lodges his claim in the destination State. Safe Third Country, on the other hand, is a country where the applicant could or should have applied for protection. When the asylum applicant arrives in his country of destination he is likely to be refused access to procedures as he could or should have applied for protection in that third country. A Safe Third Country might be a Member State of the European Union (hereinafter EU) but is generally considered to be a country outside the borders of the EU. Safe Country of Origin will mean that the asylum applicant originates from a country generally considered as safe by the EU.

Furthermore, the term “country of origin” will be used when there is a reference to the country an asylum applicant is fleeing due to fear of persecution. This can be both the country

³ Selin, Joanne van. Access to Procedures, 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits' (2002) (Online)

⁴ Legomsky, Stephen H. *Legal and Protection Policy Research Series: Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 (4) Oxford Journals 567-677 (2003).

in which he is born and the country in which he holds his nationality. The phrase “destination State” will be used for the country in which the asylum applicant wishes to settle permanently. Despite the fact that most refugees are women and children the term “he” or “his” will be used when describing a case where the sex of the asylum applicant is unknown. When not familiar with the legal status of persons referred to, the persons will be called “asylum applicants”, instead of “refugees” or similar. When reference is made regarding asylum applicants, who have been transferred in accordance with the Dublin Regulation, or returned under the Asylum Procedures Directive, the term “returnees” will be used.

PART I

2. Sources of International Law on the protection against refoulement

A clear and comprehensive overview of the international legal sources on the principle of non-refoulement will be presented in this chapter. There will be an analysis of the universal human rights regime followed by an examination of the regional instruments in the next chapter.

The discussion on applicable human rights sources will have its point of departure from the International Court of Justice and its Article 38(1), which read as follows:

- 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
 - b. international custom, as evidence of a general practice accepted as law;*
 - c. the general principles of law recognized by civilized nations;*
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.* ⁵

The principal sources of international law – international conventions, international customary law and general principles of law, will be examined before the subsidiary sources which are considered to be judicial decisions and doctrine. We shall see that treaty law, i.e. international conventions and treaties offers an extensive protection against refoulement. It will, in addition, be reference to soft law as this is of significant importance to the refugee protection.

⁵ Statute of the International Court of Justice (1945)

2.1 The 1951 Convention Relating to the Status of Refugees

The 1951 Convention relating to the Status of Refugees (hereinafter the 1951 Convention), adopted on the 28 of July 1951 with the horrors of the Second World War painfully in mind, remains the key legal document regarding protection of refugees. The aim of the 1951 Convention was to handle the flow of refugees that the war had created. However, the Second World War was unfortunately not the one and only crisis producing refugees and there has been a need for the continuance of refugee protection. To this end the 1967 Protocol was added and this makes the 1951 Convention valid beyond the time-scope first set out during the signing and ratification. The 1951 Convention and the 1967 Protocol provide the cornerstones needed in refugee protection, i.e. together they provide a definition of people in need of international protection due to persecution as well as the principle of non-refoulement.⁶ Without the principle of non-refoulement, international refugee protection could most likely not be carried out effectively.

2.1.1 Article 1. Definition of the term "refugee"

The 1951 Convention defines a person in need of international protection accordingly:

Art 1(A)(2)[a refugee is a person who]...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.⁷

⁶ The 1951 Convention relating to the Status of Refugees (1951) See Art 1(A)(2) and Art. 33 (1)

⁷ *ibid.* Art 1.C (1-6)

As the original scope of the 1951 Convention was limited both geographically and timely it was of great weight that the 1967 Protocol lifted those limitations. Today, all EU Member States, including newcomers, have signed and ratified both the 1951 Convention and the 1967 Protocol. Only Malta and Hungary have made reservations, Malta has maintained its declaration on geographical limitation with regard to the 1967 Protocol and Hungary has decided to interpret the meaning of the 1951 Convention as “events occurring in Europe or elsewhere before 1 of January 1951” instead of the written words “events occurring before 1 of January 1951”.⁸

In many scholarly writings, extensive analyses of the 1951 Convention-definition of refugees have been performed, in this study, four of the major elements a person who seeks asylum must satisfy in order to receive refugee status, will be addressed.

The first element that must be satisfied is that the applicant who is seeking asylum must have crossed an international frontier, i.e. he must be outside his country of origin or nationality. Secondly, the applicant must be unable or unwilling to avail himself to the protection of the state in question.⁹ This element is the very substance of the 1951 Convention, i.e. to offer protection to an individual that does not receive such protection from its own state, whether the state is unwilling or unable to offer efficient protection is considered less important. A genuine fear of future persecution must be presented to satisfy the third element, which should be based on well-founded fear of persecution. Fear established by past persecution may also provide a satisfactory cause to receive refugee status. Finally, the fear must be based on one or more of the 1951 Convention grounds, the fear of persecution must be connected to either race, religion, nationality, membership of a particular social group or political opinion.¹⁰ This definition, perhaps not perfect, is, as of today, the best universal tool we have. In recent times, awareness have been raised regarding gender-related persecution, however, the 1951 Convention does not provide a clear-cut definition on how to handle such persecution. Nevertheless, ‘membership of a particular social group’ has successfully been applied in cases of gender-related persecution, proving the necessary flexibility of the 1951 Convention.

It has been argued that the 1951 Convention-definition of refugees has provided a “*convenient screen behind which everyone from terrorists to mass murderers and dope dealers can*

⁸ Da Lomba, Sylvie. The right to seek refugee status in the European Union, Antwerp: Intersentia, (2004) p. 3

⁹ The 1951 Convention relating to the Status of Refugees (1951) Art 1.A

¹⁰ *ibid.*

hide”¹¹ and the refugee regime has been questioned, in particular after 9/11. The 1951 Convention, however, contains Article 1F which should prevent abuse of refugee status by persons where strong reasons exists to believe that those individuals have forfeited their right to international protection. The critics might therefore be considered as rather unfounded. Another weakness in the refugee regime, relating directly to the element that refugees must cross a border, is that it becomes insufficient to protect internally displaced people (IDP). Many people fleeing conflicts, systematic discrimination and repressive regimes never cross an international border, those people are displaced and in a flight situation, they belong to a tremendously vulnerable group due to the lack of effective international obligations. While the protection of IDP’s will not be discussed in this thesis, it is important to point out that the non-refoulement principle includes rejection at the border. It has been concluded that no person must be rejected at the border, if rejection would compel that person to remain in a territory where there are substantial grounds to believe that he would face a real risk of being subject to torture, cruel, inhuman or degrading treatment or punishment.¹² The discussions regarding the scope and applicability of the non-refoulement principle should therefore be regarded as concluded, the right to enter a territory, if in need of protection, must be regarded as an indivisible part of the principle.

Considering the detractors and the actual weaknesses of the 1951 Convention and the 1967 Protocol, it becomes even more crucial to uphold and further develop strong and efficient refugee protection, both on the international as well as on the regional levels. Today, in the region

At the start of the year 2005, the number of people of concern to UNHCR was 19.2 million. They included 9.2 million refugees (48%), 839,200 asylum seekers (4%), 1.5 million returned refugees (8%), 5.6 million internally displaced persons (29%) and 2 million others of concern (11%)
UNHCR, Refugees by Numbers, 2005 Edition.

of Europe, the EU is in a position to improve the concept of refugee protection remarkably, thus making it imperative to examine recent developments.

¹¹ UNHCR, A 'Timeless' Treaty Under Attack: Reconsidering the Convention (2001) (Online)

¹² Lauterpacht, Sir Elihu and Daniel Bethlehem. *The Scope and Content of the Principle of Non-Refoulement*, Global Consultations, (2001) See para. 253

2.1.2 Article 33(1) on the prohibition of refoulement

The 1951 Convention prohibits return of any refugee to a territory where he might be subject to treatment contrary to international refugee law:

Article 33(1) No Contracting State shall expel or return (`refouler`) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹³

The scope of Article 33(1) goes further than just to prohibit return (refoulement) of refugees. The refugee who finds himself physically in the territory of another state should be protected by the prohibition of Article 33(1). There has been more discussion on cases where a refugee has been apprehended outside the border of a territory, on his way into the country where he wishes to apply for protection. It is shown by State practice that both return, rejection at the border and extradition are recognised as to be prohibited by Article 33(1), despite the lack of precise wording of the Article. In the early days of the 1951 Convention the issue of rejection at the frontiers was discussed with various approaches, today, it is concluded that Article 33 (1) includes protection against refoulement for refugees standing at the border.¹⁴ The non-binding, but highly regarded Universal Declaration of Human Rights, provides for, in Article 14, a right for everyone to seek asylum, which makes it a necessity to allow entrance of asylum seekers.¹⁵ The 1951 Convention itself would be a failed document if there were automatic or frequent rejection at the frontier, as it would deny persons in need of protection the access to asylum procedures.¹⁶ This aspect of Article 33(1) is significant for the later discussion regarding border procedures.¹⁷ Article 33(1) does not specifically mention prohibition of extradition but clearly prohibits expulsion, both on individual as well as on a collective basis.¹⁸

¹³ The 1951 Convention relating to the Status of Refugees (1951) Art. 33(1)

¹⁴ Lauterpacht (2001) See para. 253

¹⁵ Universal Declaration of Human Rights (1948) Art. 14. 1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. Art 14. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

¹⁶ Vevstad, Vigdis. Refugee protection : a European challenge, [Oslo]: Tano Aschehoug, (1998) p. 162

¹⁷ See 6.1.6 Border Procedures

¹⁸ See Conka v. Belgium for an interpretation of collective expulsion.

2.1.3 Article 33(2) on Exceptions and Article 1F on Exclusion

The 1951 Convention included, after a British initiative, an exception to the rule of non-refoulement. Article 33(2) gives the States an option to deny protection to individuals convicted of particularly serious crimes as well as to protect its own citizens and territory from persons who might constitute a danger to the community. It is not clear whether conviction of a serious crime is connected to the issue of national security, neither is there a definition of the term “particular serious crime”. “*The offence in question and the perceived threat to the community would need to be extremely grave if danger to the life of the refugee were to be disregarded*”¹⁹ and Article 33(2) is thereby left open for the State in question to interpret what such a threat might be.

In an important respect, Article 33(2) indicates a higher threshold than Article 1F. As elucidated by Sir Elihu Lauterpacht and Daniel Bethlehem²⁰, Article 33(2) must establish that the refugee constitutes a danger to the security or to the community of the country of refuge. The provision thus depends on an estimation of a future threat from the person concerned rather than on the commission of some act in the past. In other words, if the conduct of a refugee is insufficiently grave to exclude them from the protection of the 1951 Convention by the operation of Article 1F, it is unlikely to satisfy the higher threshold in Article 33(2). Article 1F might be invoked in order to exclude persons from refugee status and the following international protection:

Article 1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments

drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

*(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.*²¹

¹⁹ Goodwin-Gill, Guy S. The refugee in international law, 2nd, Oxford: Clarendon, (1996).p. 140

²⁰ Lauterpacht (2001)

²¹ The 1951 Convention relating to the Status of Refugees (1951) Art. 1.F

Compared to Article 33(2) the provision above has included “*outside the country of refuge prior to his admission to that country as a refugee*” making it different in requirement.²²

*Article 33 (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.*²³

According to Sir Elihu Lauterpacht and Daniel Bethlehem, Article 33(2) must be construed so as to address circumstances not covered by Article 1F.

*“In our view, therefore, construed in the context of the 1951 Convention as a whole, Article 33(2) must be read as applying to a conviction for a particularly serious crime committed in the country of refuge, or elsewhere, subsequent to admission as a refugee, which leads to the conclusion that the refugee in question is a danger to the community of the country concerned.”*²⁴

2.1.4 Reservations and derogation

Reservations against Article 33 are not allowed²⁵ and exceptional measures which might be taken against nationals of another State cannot be taken against a refugee solely because he is a national of that State.²⁶ Furthermore, no general derogation from Article 33 is allowed.

²²See Krieken, Peter J. van. Refugee law in context : the exclusion clause, The Hague: T.M.C. Asser Press, (1999) for a more thorough discussion on the Exclusion Clause.

²³ The 1951 Convention relating to the Status of Refugees (1951) Art. 33.(2)

²⁴ Lauterpacht (2001) p. 53

²⁵ The 1951 Convention relating to the Status of Refugees (1951) Art. 42(1) *At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than Articles 1, 3, 4, 16(1), 33, 36-46 inclusive.*

²⁶ *ibid.* Art. 8 *Exemption from exceptional measures. With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting State shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this Article, shall, in appropriate cases, grant exemptions in favour of such refugees.*

2.2 1984, The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The principle of non-refoulement is found not only in the tools protecting refugees but also in basic human rights treaties, in customary international law, in soft law and in the Executive Committee Conclusions made by the UNHCR. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter UNCAT) firmly states that no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture.²⁷ The human rights documents stretches, generally, further then the refugee regime, as it allows no exceptions, reservations or derogation.

2.3 1966, The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights²⁸ (hereinafter ICCPR) prohibits torture in its Article 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

This obligation has been construed by the UN Human Rights Committee, in its General Comment No.20 (1992), to include a non-refoulement component as follows:

*“... States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”.*²⁹

According to human rights documents, protection against refoulement is absolute; no possibilities exist to derogate from articles prohibiting torture, cruel and inhuman or degrading treatment.

²⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) Art. 3.1, 3.2

²⁸ The International Covenant on Civil and Political Rights (1966) Art. 7

²⁹ General Comment No. 20: concerning prohibition of torture and cruel treatment or punishment (Art. 7) : . 10/03/92.CCPR General Comment No. 20. (1992)

2.4 Customary International Law and General Principles of Law

Customary international law is legally binding upon all States. As an unwritten law, it derives from two sources. A consistent practice among States that confirm the norm and an acknowledgement by States that it is legally binding. This understanding and acceptance by States is often called “*opinio juris*”. “Soft law” instruments are important as they, if advocated decisively, implemented and practised in national legislation, in a long-term perspective, might turn into international customary law. Furthermore, “soft law” instruments are important sources when interpreting public international law and it has a significant impact on refugee protection.

A number of “soft law” instruments advocates in the most decisive wordings, the importance of the non-refoulement principle and, by doing this it further proves the nature of international customary law of the principle of non-refoulement. The UN Declaration on Territorial Asylum of 1967, a “soft law” instrument, is considered as of importance to the refugee regime. It prohibits both refoulement as well as non-admission at the border in one of its articles:

*Art. 3 No person...shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.*³⁰

In addition the UN General Assembly has adopted several resolutions, urging States to refrain from refoulement. Resolution 137 from the one from the 44th session of 1989, is one example. The General Assembly, in Resolution 137:

*Calls upon all States to refrain from measures that jeopardise the institution of asylum, in particular the return or expulsion of refugees and asylum-seekers contrary to fundamental prohibitions against these practices, and urges States to continue to admit and receive refugees pending identification of their status and of appropriate solutions to their plight.*³¹

³⁰ UN Declaration on Territorial Asylum (1967) Art. 3

³¹ UN General Assembly, Resolution 137 (1989)

The UN General Assembly not only urges the States to comply with the international human rights law but in several documents, also states the importance of the UNHCR. UNHCR is the only international organisation, invested with the mandate to develop and protect refugees by the UN General Assembly. States have an obligation, according to Article 35 of the 1951 Convention to co-operate with the UNHCR.³²

Global Consultations on International Protection was an initiative by the UNHCR as they wished to mark the 50th anniversary of the 1951 Convention, and the goal of the Consultations was to promote the full and effective implementation of the 1951 Convention and its 1967 Protocol. The UNHCR wished to make a contribution to the future development of the refugee protection regime and create appropriate tools to strengthen the standards and protection mechanisms in areas that were not fully covered by the 1951 Convention and its 1967 Protocol. The UNHCR Executive Committee embraced the suggestion for a process of Global Consultations which involved States, individual experts and Non Governmental Organisations (hereinafter NGO's) in its Conclusion on International Protection in year 2000.³³

Several Global Consultation-meetings were arranged by UNHCR³⁴ and one particular meeting was held where the scope and content of the non-refoulement principle was addressed. The roundtable concluded that the non-refoulement principle is customary international law and that Article 33 of the 1951 Convention applies to refugees regardless of their formal recognition as well as to asylum seekers up until their status has been finally determined in a fair proceeding.³⁵

The UNHCR Executive Committee has produced a number of General Conclusions (hereinafter ExCom Conclusions) and it has dealt with both mass influx situations and international protection in general. Several of the ExCom Conclusions has directly addressed

³² Lewis, Corinne. *UNHCR's Contribution to the Development of International Refugee Law: Its foundations and Evolution*, 17 International Journal of Refugee Law 68-90 (2005) p. 68-90. See also the Statute of UNHCR, Art. 8

³³ Executive Committee General Conclusion (2000)

³⁴ With assistance of the co-organiser Lauterpacht Research Centre for International Law in Cambridge.

³⁵ Lauterpacht (2001) p. 89

the principle of non-refoulement³⁶ and its importance in refugee protection, this is also clearly stated in the UNHCR Handbook on Refugee Protection.³⁷

As the focus in this thesis is on the development of EU-legislation, it is of interest that UNHCR has signed agreements with the EU, with the aim to strengthen the co-operation between the two parts.³⁸ UNHCR has, during the development of CEAS, been an active and important partner of co-operation to the EU.

2.5 Concluding remarks

The principle of non-refoulement is essential to the refugee regime and furthermore, the principle is part of customary international law. Thereby the principle of non-refoulement is applicable and legally binding on all States, at all times. For the purpose of refugee protection the 1951 Convention and the 1967 Protocol are indispensable. However, international human rights treaties and conventions, provide for an absolute guarantee that no person shall be sent back, expelled or extradited to a territory in which his life and freedom would be in danger. The human rights regime offers a broader protection against non-refoulement as it prohibits not only torture, inhuman or degrading treatment or punishment but in addition, it does not allow return of an individual who will face the death penalty upon arrival. An individual regarded as a threat to the life of the nation is protected against refoulement, not in the refugee regime, but by international human rights law. Public international law and customary international law are superior to regional and national laws, meaning that no country, nor region, must violate the principle of non-refoulement. All Member States of the EU are bound, first and foremost to its international obligations, regional legislation and national implementation must therefore be in compliance with those obligations.

³⁶ Executive Committee General Conclusions (1979-2004) *See complete list in Bibliography.*

³⁷ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979 (re-edited 1992)) (Online)

³⁸ UNHCR signs cooperation agreements with European Commission (2005b) (Online)

3. Sources of Regional Law on the protection against refoulement.

The principle of non-refoulement has developed at the regional level in the form of multilateral treaties. In addition, recommendations and resolutions have played a crucial role. There will be an examination of the European developments but first the Latin American, African and Asian developments will be presented briefly in order to give an overview.

3.1 The Americas

In 1889, the Montevideo Treaty on International Penal Law provided for an article which excluded extradition for political crimes and this was followed by the Convention on Diplomatic Asylum in 1954. Today, the principle of non-refoulement has evolved to a fully accepted rule and is referred to as a rule of “jus cogens” within this region.³⁹ The Cartagena Declaration from 1984 emphasises the importance of the non-refoulement principle and refers to it as a cornerstone in refugee protection. Even though not legally binding, the Cartagena Declaration is widely accepted and implemented in national legislation. There is no record of attempt of States to make reservations against the principle of non-refoulement.⁴⁰

Asia hosted more than a third of all the people of concern to UNHCR, 6.9 million or 36%, followed by Africa 4.9 million (25%), Europe 4.4 million (23%), North America 853,300 (5%), Latin America 2 million (11%) and Oceania 82,400 (0.4%)
UNHCR, Refugees by Numbers, 2005 Edition.
www.unhcr.org

3.2 Africa and Asia

In 1979, at the Arusha Conference, government delegations stressed the importance of the scrupulous observance of the principle of non-refoulement. In particular, they referred to the Organization of African Unity (hereinafter OAU) Refugee Convention which prohibits not only rejection at the border, but also return and expulsion of any refugee to a territory where he has reason to fear persecution. Today, all States, except Libya and Eritrea, in the African region are bound to the 1951 Convention and/or the 1967 Protocol. Furthermore, 53 States have acceded to the 1969 OAU Convention governing the Specific Problems of African Refugees, among them Libya. The OAU Convention contains a strict prohibition of

³⁹ Vevstad (1998) p. 150. This thesis will not assess whether the principle of non-refoulement belongs to the rule of jus cogens.

⁴⁰ Goodwin-Gill (1996) p. 125

refoulement and all countries at the African continent, except Eritrea, are bound to conventional law and treaties, which prohibit refoulement.

In 1966 the Asian-African Legal Consultative Committee adopted the “Bangkok Principles” which contain a reference to non-refoulement. There has been a slow and reluctant approach by the Asian States to sign and ratify the 1951 Convention and the 1967 Protocol and much work lies ahead in order to establish a regional mechanism that can protect refugees efficiently.⁴¹

3.3 The European development of the non-refoulement principle.

The European Convention on Human Rights⁴² and the role and interpretation of the European Court of Human Rights will, in this part of the study, be examined. As the new European Charter of Fundamental Rights specifies that any rights that correspond to those already articulated by the European Convention on Human Rights shall have the same meaning and scope, there will not be an examination of the European Charter.

3.3.1 The 1950 European Convention on Human Rights

Europe does not have a treaty prohibiting refoulement of refugees. In other words, it does not have a treaty protecting refugees specifically.⁴³ When the question of refoulement has arisen, the 1950 European Convention on Human Rights (hereinafter ECHR) has been pleaded, in particular Article 3, which prohibits torture, inhuman, or degrading treatment. The ECHR, does not explicitly prohibit expulsion or extradition of aliens nor does it protect refugees. However, both the European Commission⁴⁴ and the European Court on Human Rights⁴⁵ (hereinafter the Court) have interpreted Article 3 in favour of protection against forcible

⁴¹ Vevstad (1998) p. 149

⁴² European Convention on Human Rights and Fundamental Freedoms (1950)

⁴³ Vevstad (1998) The author suggest the creation of a European Convention on Refugee Protection

⁴⁴ European Commission (2003) (Online) *Although the European Commission on Human Rights became obsolete in 1998 with the restructuring of the Court of Human Rights, it held an important role in assisting the European Court of Human Rights from 1953 to 1998. Commission members were elected by the Committee of Ministers and would hold office for six years (during which time they were to act independently, without allegiance to any state). Their role was to consider if a petition was admissible to the Court. If so, the Commission would examine the petition to determine the facts of the case and look for parties that could help settle the case in a friendly manner. If a friendly settlement could not take place, the Commission would issue a report on the established facts with an opinion on whether or not a violation had occurred. A Committee of three people determined the admissibility of a petition. For difficult decisions, however, a Chamber consisting of seven people handled it.*

⁴⁵ Protocol No.11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1994)

return of aliens towards a territory in which they might be at risk of torture, inhuman or degrading treatment⁴⁶.

Due to the scope of Article 3, protection might be granted on grounds not provided for by the 1951 Convention and the 1967 Protocol. It does not consider persecution on the five grounds (race, religion, and nationality, membership of a particular social group or political opinion) as a prerequisite for protection. Article 3 has been pleaded in various cases, from protection against the death row phenomenon⁴⁷ as well as protection from stoning due to an adulterous relationship in Iran⁴⁸, and it can be said that the ECHR is a living document and has had various interpretations. The difficulty with cases involving issues of extradition, expulsion and forcible return is the burden of proof. A case shall be assessed in the light of the material presented before the Court or obtained by request of the Court. The Contracting Party, calling for expulsion, extradition or forcible return, must assess the existing risk of torture, inhuman or degrading treatment upon return of the individual. It must refer to facts known at the time of the desired expulsion. The Court might claim that the Contracting Party should have had information which it did not present before the Court and subsequent information which comes before the Court can give weight to the case. Furthermore, the feared ill treatment referred to by the applicant must attain a minimum level of severity if it is to fall within the scope of Article 3.⁴⁹ The assessment of this minimum requirement of severity will depend on all the circumstances of the case. There have been arguments that the Court is more likely to be persuaded by reports from reputable and objective sources rather than statements from individuals and organisations, which might be less objective.⁵⁰ In fact, most cases alleging breach of Article 3 in this context have failed on the facts, i.e. the applicant was unable to satisfy the European Commission [or the Court] that his life or liberty was sufficiently at risk, according to Goodwin-Gill.⁵¹ The role of the Court is to ensure compliance with the provisions of the ECHR, i.e. the Court might decide that there has been, or that it might be, a violation of Article 3 by a Contracting Party, if it sends an individual to a potential destiny of torture, inhuman or degrading treatment.⁵²

⁴⁶ *Vijayanathan and Pusparajah v. France*

⁴⁷ *Soering v. The United Kingdom*

⁴⁸ *Jabari v. Turkey*

⁴⁹ See *The Republic of Ireland v. United Kingdom* for an interpretation of torture, inhuman and degrading treatment.

⁵⁰ Jacobs, Francis G....[et al.]. *The European Convention on Human Rights*, 3rd, Oxford: Clarendon Press, (2002) p. 85

⁵¹ Goodwin-Gill (1996) p. 177

⁵² *ibid.* P. 177

The Court has pronounced Article 3 as highly relevant in cases involving extradition, return and expulsion⁵³ and a case that can be used as an example to highlight the Courts application of Article 3 is T.I. v. United Kingdom. The applicant was fleeing persecution in his native country Sri Lanka and first applied for international protection in Germany. As Germany considered the alleged persecution as an act by non-state actors it did not grant protection to the applicant. In accordance with German practice, non-state actors were not recognised as agents of persecution. The applicant had been subject to treatment contrary to Article 3 while held in detention in Sri Lanka. The applicant continued his flight to United Kingdom and again he applied for international protection. The applicant was examined by a doctor at the Medical Foundation (Caring for Victims of Torture), and received a medical report supporting his history as a victim of torture. As both the United Kingdom and Germany were Contracting Parties to the 1951 Convention and its 1967 Protocol, the ECHR, as well as State Parties to the Dublin Convention, the United Kingdom rejected the application. The reasoning of the United Kingdom was that Germany was to be considered as a safe country and, in accordance with the Dublin Convention, the State responsible for the examination of the application. The Court agreed that the applicant might not face treatment contrary to Article 3 in Germany but it stated: *“His removal to Germany is however one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face the real risk of such treatment.”*⁵⁴

The Court found that the indirect removal [in this case] to an intermediary country, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the ECHR. The Court addressed the possible implications of international agreements reached in order to co-operate in certain fields [such as the field of asylum in this particularly case] as a potential risk of undermining international obligations of human rights. According to the Court, *“it would be incompatible with the purpose and object of the Convention [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention [ECHR] in relation to the field of activity covered by such attribution [as international agreements on co-operation in certain fields]”*.⁵⁵ This decision made by the Court is highly relevant when considering the development of the principle of non-refoulement within Europe in conjunction with the new legislation of the EU concerning the field of asylum and migration, and, in particular, the

⁵³ Vevstad (1998) p. 153

⁵⁴ T.I. v. The United Kingdom

⁵⁵ *ibid.*

recent codification of the “third country” concepts. Multilateral agreements, reached by Members of the EU, must be in compliance with ECHR and they cannot, by any means, void the obligation to respect and protect the principle of non-refoulement. The principle is absolute and a Member State can not afford even the slightest risk, it must therefore take individual responsibility and make sure that all persons within its territory are protected against refoulement. One single mistake of forcible return is one mistake to much.

Another court decision concerning the non-refoulement principle can be found in the case of *Hilal v. United Kingdom*.⁵⁶ The applicant fled his native home, Zanzibar, due to persecution on political grounds and he applied for international protection in the United Kingdom. The claims made in his application were at first considered implausible and inconsistent and his appeal was dismissed. However, new supporting evidence was presented and the application was reconsidered in light of this fresh material. Again, his application was dismissed, and he was told that he would be removed to Zanzibar. The United Kingdom argued that the applicant could use the so-called “internal flight” option, i.e. that he could go to mainland Tanzania because there he could receive protection. The Court based its reasoning on reports from Amnesty International and the US State Department and concluded that “internal flight” would not be sufficient for the applicant. Mainland Tanzania and Zanzibar had at the time close political ties and the possibility that persecution would be carried out in Tanzania could not be eliminated. The Court concluded that there was a real risk of continued persecution based on the applicant’s political opinion and that the authorities of Zanzibar might extradite the applicant towards mainland Tanzania. According to the Court, the authorities in Tanzania would not be able, or willing, to protect the political dissident. Therefore, it would be a breach of Article 3 if the United Kingdom removed the applicant towards Tanzania or Zanzibar. The discussion on “internal flight” alternatives will be further analysed in Section 6.1.4.

3.4 Concluding remarks

The non-refoulement principle is part of conventional law, as well as customary international law in the region of Europe. Both the 1951 Convention and the 1967 Protocol provides for protection against expulsion, return and extradition and in addition there is the ECHR. The interpretation made by the Court on Article 3 has shown to be of importance to the refugee protection within Europe. The ECHR embraces a larger scope and even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Court is firm,

⁵⁶ *Hilal v. United Kingdom*

ECHR prohibits, in absolute terms, torture or inhuman or degrading treatment or punishment. The development within the region has been rapid and a significant body of case law has been the consequences. According to the Court, bilateral and multilateral agreements must not absolve the Contracting Parties, in any manner, from their international obligations to protect persons from torture, cruel, inhuman and degrading treatment. Furthermore, no one should be sent to a territory where such treatment could be carried out, whether by state agents or non-state actors according to public international law. The Court has interpreted the ECHR and Article 3 as an absolute rule and the responsibility to protect persons from treatment contrary to the ECHR lies entirely upon the Contracting Parties. All Members of the EU have, not only international obligations, but obligations on the regional level and must therefore assure compliance with both sources of law.

Part II

4. The European Union and protection of refugees

4.1 Historical Background

Until mid 1970 Europe had a relatively lenient approach towards refugee issues, it was not an urgent matter on the political agenda and received little public attention. However, the increasing numbers of refugees during 1970 brought back the need to discuss refugee matters. Several developments and events made the refugee flow increase, such as harsh communist regimes, end of colonisation, increased mobility of people etc., being among the many causes.⁵⁷

The Europeans went into the think-tank and bilateral and multilateral discussions took place, an ad hoc Group on Immigration, consisting of Ministers of Interior and Ministers of Justice, was established by the Members of the European Community. The work of the ad hoc Group led to the suggestion of an intergovernmental instrument, namely the Dublin Convention which set out to determine which State should be held responsible for examining applications lodged in one of the Member States of the European Communities.

4.1.1 Treaty of Amsterdam

The most significant development at the EU level took place in October 1997, as the then fifteen EU Member States adopted the Amsterdam Treaty, consolidating the 1992 Maastricht Treaty that had established the European Community. As the Amsterdam Treaty entered into force in 1999, the EU's Heads of State held a summit in Tampere, Finland and adopted the political guidelines that would constitute the framework for the EU policies and legislation on asylum and immigration issues.

⁵⁷ Lavenex, Sandra. The Europeanisation of refugee policies : between human rights and internal security. Aldershot: Ashgate, (2001) p. 3

Title IV of the Amsterdam Treaty sets out criteria and offers mechanisms on how visas, asylum and immigration policies should develop in connection to the freedom of movement of persons within the EU. The Treaty provides for a five-year period in which several objectives should be developed towards a harmonised asylum policy and sets the framework for the minimum standards. According to Article 63, criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States, should be established. Furthermore, minimum standards on both reception conditions as well as on definition of qualification for refugee status would need to be harmonised throughout the EU. Article 63, also address the need of a common standard on procedures for the granting and withdrawing of refugee status as well as a set of standards regarding entry and residence permits. The Amsterdam Treaty was the start of the first phase of CEAS.

4.1.2 The Tampere Conclusions

The Tampere Conclusions reaffirmed the EU commitment to be a transparent and secure area with full compliance of the 1951 Convention and other relevant human rights instruments and the need to work for coherence between Member States when carrying out internal and external policies.⁵⁸ The Tampere Conclusion reaffirmed the “the absolute respect of the right to seek asylum” and the need to maintain full respect for the principle of non-refoulement.⁵⁹ A long-term commitment to implement a more vigorous integration policy, in order to give persons granted asylum, the same rights and obligations as citizens of the EU in all aspects of life as well as a uniform status throughout the EU, was addressed in the Conclusions.⁶⁰ With the mandate of the Amsterdam Treaty, several legislative instruments were suggested and three of them were adopted in 2004, being within the given five-year period offered at the summit in Tampere.

⁵⁸ ECRE. *Broken Promises - Forgotten Principles* European Council on Refugees and Exiles (2004b) (Online)

⁵⁹ Council, European. *Political Guidelines: Presidency Conclusions*, European Council (1999)(Online)

⁶⁰ *ibid.*

The first three legal instruments adopted were the Reception Conditions Directive⁶¹, the Dublin Regulation⁶², and the Qualification Directive.⁶³

The fourth instrument, the Asylum Procedures Directive was adopted in December 2005 but has not thus far been transposed into the national legislation of the Member States.⁶⁴

4.1.3 The Hague Programme

According to the Tampere Conclusions, the first phase of CEAS was completed as the four legal instruments [mentioned above] were adopted. The Hague Programme represents the second phase and has a clear set of goals: the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. The second phase of development of a common policy in the field of asylum, migration and borders started on 1 May 2004. It ought to be based on solidarity and fair sharing of responsibility, including its financial implications and closer practical co-operation between Member States. Furthermore, technical assistance, training, and exchange of information, monitoring of the adequate and timely implementation and application of instruments as well as further harmonisation of legislation is expressed as the goal. The second phase will include an evaluation of the first phase and be completed in 2010. The Hague Programme has ten key points of priority, one of which handles the area of asylum and migration and sets the following goals:

- a common European asylum system with a common procedure and a uniform status for those who are granted asylum or protection by 2009;
- measures for foreigners to legally work in the EU in accordance with labour market requirements;
- a European framework to guarantee the successful integration of migrants into host societies;
- partnerships with third countries to improve their asylum systems, better tackle illegal immigration and implement resettlement programmes;
- a policy to expel and return illegal immigrants to their countries of origin;

⁶¹ Minimum Standards for the Reception of Asylum Seekers, 27 of January, (Council Directive 2003/9/EC) Official Journal L 031, 06/02/2003 P. 0018 – 0025 (2003a)

⁶² Establishing the Criteria and Mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003a)

⁶³ Minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 29 of April, (Council Directive No. 2004/83/EC) Official Journal L 304 , 30/09/2004 P. 0012 - 0023

⁶⁴ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005)

- a fund for the management of external borders;
- Schengen Information System (SIS II) - a database of people who have been issued with arrest warrants and of stolen objects to be operational in 2007
- common visa rules (common application centres, introduction of biometrics in the visa information system)⁶⁵

Amnesty International (hereinafter AI) has expressed its concern regarding the common asylum system based on the low standards agreed on in the first phase. The Hague Programme marks a decisive shift from harmonisation of the internal policy and legislation towards harmonisation of external relations. The focus has shifted from concerns regarding protection towards concerns regarding external control and unfortunately those two concepts seems to contradict one and another. AI has expressed its serious doubt regarding the Hague Programme and is concerned that the aims to fight illegal immigration might have a negative impact on human rights and in particular on refugee protection.⁶⁶ ECRE has called for a deletion of the entire Asylum Procedures Directive and has articulated its most serious concerns regarding the lack of procedural safeguards and the low standards offered in the Directive.⁶⁷ UNHCR has, similarly with ECRE, pointed out that the Asylum Procedures Directive contains no binding commitment to satisfactory procedural safeguards and in addition, the rules permitting the designation of “safe third countries” as an error.⁶⁸ As there will be an examination of the Asylum Procedures Directive, no hasty conclusions will be drawn at this point. However, according to public international law, as stated in the first chapter, persons seeking a safe haven must be granted access to procedures and the procedures must be fair and each individual case must be examined in substance.

⁶⁵ EurActive.com. *Hague programme - JHA programme 2005-10*, EurActive.com (Online)

⁶⁶ International, Amnesty. *EU Association Annual Report* Amnesty International EU Office (Online)

⁶⁷ Re: Call for withdrawal of the Asylum Procedures Directive (2004a) (Online)

⁶⁸ UNHCR regrets missed opportunity to adopt high EU asylum standards (2004b) (Online)

5. Dublin, from Convention to Regulation

The Dublin Regulation⁶⁹ as we know it today has developed over a period of time and succeeded the Dublin Convention, adopted in 1990. The Regulation was adopted as part of CEAS within the framework of the Amsterdam Treaty and like the Convention, the Regulation also addresses the concept of “first country of asylum”, i.e. the asylum applicant should apply for asylum in the first country of arrival within the Dublin-area, and that this country is responsible for the applicant. In order to implement the Regulation, a set of criteria has been established and it is considered as crucial part of the harmonised approach of the European asylum policy and an important instrument for the prevention of multiple demands of asylum, sometimes referred to as “asylum-shopping”. As a Regulation, it is binding in its entirety and directly applicable in all Member States. Norway, Iceland (and soon Switzerland) are also partner in the co-operation through special agreements and belong to the Dublin-area. The Dublin Regulation entered into force on the 25 of March 2003.⁷⁰ It has, as part of its preamble, reference to the 1951 Convention and the 1967 Protocol and it particularly points out the importance of the principle of non-refoulement. Today, all 25 EU Member States including Norway, Iceland and Switzerland are considered to be safe countries, making it possible to return asylum applicants as soon as the question of responsibility has been satisfied.

Another regulation proposed by the Amsterdam Treaty is the EURODAC system. From January 2003, all EU Member States as well as Norway and Iceland must record fingerprints of all people applying for asylum and aliens moving irregularly between Member States.⁷¹ EURODAC facilitates the implementation of the Dublin Regulation as the flight-routes of asylum applicants can be tracked in a more systematic manner and thereby also the establishment of the “first country of asylum”, the country responsible to examine the asylum application.⁷²

⁶⁹ Establishing the Criteria and Mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003a)

⁷⁰ *ibid.*

⁷¹ The establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention (2000)

⁷² *ibid.*

5.1 Content of the Dublin Regulation

The Dublin Regulation consists of two components; first, it sets criteria for the country responsible for examination of asylum applications lodged by a third-country national i.e. a non-citizen of the EU, secondly, it sets the criteria for transfer and return of asylum applicants to the “first country of asylum”.

5.1.1 Burden-sharing and Responsibility

Ruud Lubbers, former High Commissioner of the UNHCR addressed the importance of burden-sharing and solidarity between the Members of the EU as well as solidarity towards neighbouring States of the EU.⁷³ ECRE argues that, in practice, the Dublin Regulation will achieve the opposite. Member States with long coastlines and Member States on the periphery, especially in the south and in the east of the EU are likely to receive more asylum applicants, even though those countries might not necessarily be the best equipped.⁷⁴ Likewise, UNHCR is concerned that the Dublin Regulation will produce significant inequalities in terms of burden sharing within the EU.⁷⁵

*Returns under the Dublin II [Dublin Regulation] could therefore overwhelm less well-equipped asylum system and contribute to pressure for irregular onward movement within the EU. Ultimately, the overloading of some national asylum systems could jeopardise the harmonisation process itself as well as respect for basic protection standards.*⁷⁶

Under the General Principles of the Regulation it is clearly stated that one Member State, but only one, shall examine an application lodge by a third-country national.⁷⁷ However, there is a derogation from that paragraph which allow another Member States to take on the examination, even though not responsible in the first place. The Member State who wishes to take over the responsibility, applying the so-called “sovereignty clause” should, where

⁷³ EU should share asylum responsibilities, not shift them (2004) (Online)

⁷⁴ Comments from the ECRE on the Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (2001) (Online)

⁷⁵ UNHCR's Observations on the European Commission's Proposal for a Council Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National (COM (2001) 447 final) (2002) (Online)

⁷⁶ UNHCR. *A Revised "EU Prong" proposal*, (2003) (Online)

⁷⁷ Establishing the Criteria and Mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003a) Art. 3.1

appropriate, inform the Member State where the asylum applicant first entered the EU.⁷⁸ Nevertheless, the right to send the asylum applicant to a third State, i.e. the Member State who first received the asylum applicant, remains.⁷⁹ The sovereignty clause offers a significant opportunity for Member States to shoulder the responsibility in cases where they might fear the risk of chain-deportation of the asylum applicant. Furthermore, with this paragraph Member States can secure fair treatment and access to procedures as in accordance with their international obligations, one can say that the sovereignty clause gives the Members the possibility to act correctly without having to rely on its neighbour's asylum systems. If applied, the sovereignty clause is, simply put, a secured ticket to compliance of the non-refoulement principle.

5.1.2 Access to Procedures and Procedural Safeguards

The major problem with the Dublin Regulation, as expressed by Stephen H. Legomsky⁸⁰ occurs when asylum applicants are returned to the “first country of asylum”. He argues that when destination countries attempt to return asylum applicants to third countries that might be hesitant to readmit the applicants, there is a risk that the phenomenon of “refugee in orbit” occurs. A “refugee in orbit” is an asylum applicant who cannot get access to any country and any procedures as he is rejected by several countries, he might be sent back and forth by the States who reject him. This presents a supreme danger to the asylum applicant as he might become subject to indirect or direct refoulement and end up in the country he first fled, the country of persecution.

If a third country is willing to readmit the applicant it is crucial that it can, and that it is willing, to provide for a full substantive asylum procedure. A survey made by ECRE indicates that returnees are being denied access to asylum procedures, the result might be that the returnees do not get their case properly examined, some Member States, such as Greece, even deny access to a determination procedure altogether.⁸¹ This constitutes a real risk of

⁷⁸ *ibid.* Art. 3.2

⁷⁹ *ibid.* Art. 3.3

⁸⁰ Legomsky (2003)

⁸¹ ECRE. *Report on the application of the Dublin II Regulation in Europe*, European Council on Refugees and Exiles (2006) (Online)

refoulement and States must not expose individuals to the danger of persecution, torture or inhuman treatment according to public international law.⁸²

The procedures in the receiving State must not have any faults as it might lead the third country to erroneously conclude that the applicant is not in need of protection and thereby send him back to persecution. In Greece, the practise shows that the returnees, even though readmitted, are issued systematically with deportation orders and are detained prior to expulsion.⁸³

Many central and eastern European countries return asylum applicants to eastern neighbours despite their often inadequate refugee status determination procedures, according to Legomsky. The Member States must therefore consider return of an asylum applicant a potential step towards violation of the non-refoulement principle, if sending him to a country with inadequate asylum procedures. The same risk appears if the third country has an impermissibly restrictive substantive interpretation of the refugee definition. This was shown in the case *T.I. v. the United Kingdom* where the applicant fled, not only his native country Sri Lanka but also Germany as it would not grant him protection due to restrictive interpretation of the 1951 Convention and its Article 1A. In this situation, where the country responsible for the asylum application did not recognise non-state actors as agents of persecution, the Court concluded that bilateral and multilateral agreements between its Contracting Parties must not absolve them from their international obligations.

Furthermore, the Court expressed that the United Kingdom might, by sending T.I. back to Germany, set in motion a chain of events leading to a violation of Article 3 of the ECHR. The Dublin Convention offered the same procedures concerning “first country of asylum” as the current Dublin Regulation does today.⁸⁴ However, CEAS, with its Qualification Directive, has now eliminated the possibility for its Member States not to recognise non-state actors as agents of persecution. Yet, the statement of the Court, regarding the risk of indirect or direct violation of the non-refoulement principle, upon removal of the applicant, remains an issue with the present system as the Member States have various practises.

Many States (Belgium, France, Ireland, Italy, the Netherlands, Slovenia and Spain) close the case if the asylum applicant withdraws or abandons his application. Some States do not allow a reopening of the case and the returnees are left with nothing except the option to try to

⁸² General Comment No. 20: concerning prohibition of torture and cruel treatment or punishment (Art. 7) : . 10/03/92. CCPR General Comment No. 20. (1992)

⁸³ UNHCR, *The Dublin II Regulation: Updated Memorandum on the Law and Practise of Greece (2005a)*

⁸⁴ *T.I. v. The United Kingdom*

submit a subsequent application. For a subsequent application to be accepted, new facts or circumstances must be presented. Certain States, namely Belgium, Hungary, the Netherlands, Slovenia, Sweden and the United Kingdom demand new facts or evidence before they reopen a case. If the asylum applicant do not possesses such facts or evidence, he will risk that his case is not fully examined and that he will be returned contrary to international human rights law and in particular contrary to the principle of non-refoulement.⁸⁵ This practise must therefore be changed instantly; both the legislation and the actual implementation of such legislation must be in compliance with international obligations assumed by the Member States.

If readmitted under the Dublin system, the returnees face different kinds of procedures. Some countries (Greece, Sweden, Poland) do not provide free legal assistance, some countries (for example, Norway) only limited assistance for returnees while full assistance is given to “regular” asylum applicants. ECRE has urged the Members of the EU to allow asylum applicants access to legal advice as well as sufficient time in order to raise all relevant grounds that would prevent further transfers.⁸⁶ This should be considered as an essential part of procedural safeguards that could effectively challenge possible errors and prevent States from violating the principle of non-refoulement.

Not only the access to legal aid but also the procedures concerning personal interview, are different between the Members. Some countries (for example, Italy) do not provide for a personal interview, until the authorities handling returnees has determined the State responsible. Such restrictions limit the possibilities for asylum applicants to give information regarding the possible presence of family members in other Member States. This might have a negative impact on cases where family reunification is desired. Furthermore, it is not fully assured that the returnees, if given access to procedures, are granted a fair proceeding by the qualified authorities. Some Member States does not carry out substantive interviews and furthermore, when the interviews are carried out, border officials who are not necessarily trained for the task conduct them.⁸⁷ UNHCR requires that a competent official shall handle asylum applications and that he shall act on clear instructions regarding the international

⁸⁵ Report on the application of the Dublin II Regulation in Europe (2006) (Online)

⁸⁶ *ibid.*

⁸⁷ *ibid.*

obligations assumed by his State.⁸⁸ This is essential, trained personnel must be provided for by the Member States, in order to avoid wrongful decisions, which might, in a worst case scenario, lead to refoulement of persons in need of international protection.

5.1.3 Persecution of asylum applicants returned under the Dublin Regulation

Legomsky argues that persecution might continue in the “first country of asylum” and gives the example of Afghan refugees persecuted in Pakistan. Persecution of asylum applicants has, according to AI occurred also in the European Union. AI has expressed its serious distress regarding the treatment of Afghan refugees in Greece, allegedly tortured and mistreated by Greek police officers during interrogations.⁸⁹ Both state actors as well as non-state actors might carry out persecution against asylum applicants. The sending Member State should therefore take this into consideration, before return to the “first country of asylum” of the individual asylum applicant might take place. Would an asylum applicant be returned to persecution, torture, inhuman and degrading treatment, under the Dublin Regulation, it must be considered as a violation not only against Article 33 of the 1951 Convention but also against international human rights law, in particular Article 3 of the ECHR, Article 3 of UNCAT and Article 7 of the ICCPR.⁹⁰

5.1.4 Detention of returnees

Freedom of movement remains an issue in the “first countries of asylum”, where detention is the obvious limitation of freedom.⁹¹ The Jesuit Refugee Service Europe reports about systematic detention of returnees in Italy, this practise is implemented as in accordance with Italy’s national legislation. The detention of asylum applicants in Italy has received criticism by various NGO’s, among them the Jesuit Refugee Service Europe, which argues that the 16 detention camps in Italy rarely meet the criteria set out by the UNHCR. The detention camps have been overcrowded, no recreational facilities have been afforded the detainees, women and children have not received adequate protection⁹² and the detainees has been subject to

⁸⁸ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979 (re-edited 1992)) (Online) See Part II

⁸⁹ International, Amnesty. *Concerns in Europe and Central Asia, July - December, 2003, (2004)*(Online)

⁹⁰ See Part I, Chapter 1 & 2

⁹¹ See Cruz Varas and Others v. Sweden for an interpretation on the Freedom of Movement

⁹² UNHCR, Guidelines on the Protection of Refugee Women (1991) (Online)

physical assaults by law enforcement officers.⁹³ One major concern regarding the detention of returnees, as expressed by ECRE, is limited access to legal counselling and advice during the detention period.⁹⁴

Austria has been severely criticised by church organisations, politicians and NGO's as unaccompanied minor asylum applicants are held in detention⁹⁵ and Austrian detention practices also separates families. In several cases, the Austrian authorities have arrested the male asylum applicant, often depriving his wife and children of a source of income.⁹⁶ Unaccompanied minors should, ECRE argues, never be detained, no matter the circumstances.⁹⁷

As part of the CEAS, the EU has adopted a Reception Directive.⁹⁸ This Directive sets out the criteria for reception of asylum applicants within EU and it refers to both the 1951 Convention and the Charter of Fundamental Rights of the European Union, and in particular, it states the need to maintain respect of the principle of non-refoulement. Furthermore, it establishes criteria for the detention of asylum applicants. In the preamble, the first criterion is that reception of asylum applicants, who are held in detention, should be designed to meet their needs. One could ask what such needs would be and if all Member States would regard those needs in the same way. Article 7.3 provides the second criteria: *When it proves necessary, for example for legal reason and public order, Member States may confine an applicant to a particular place in accordance with their national law.*⁹⁹ To seek asylum is not a criminal act and detention should be used only as a last resort. Member States should keep in mind that the asylum applicants, fleeing persecution, might have suffered imprisonment and mistreatment, detention could therefore cause severe stress, both emotional as well as psychological. ECRE has expressed that detention, if causing the asylum applicant such stress, might amount to inhuman and degrading treatment.¹⁰⁰ The concerns that have been raised regarding the increasing use of detention practises among Member States are worrying as it might increase the risk of violation against the non-refoulement principle. Detention causing severe stress for the individual applicant, amounting to treatment contrary to Article 3

⁹³ Europe, Jesuit Refugee Service. *Detention Centre and Practices in Italy*, Jesuit Refugee Service Europe (2005) (Online)

⁹⁴ See *Conka v. Belgium* for an interpretation of Unlawful Detention. For a discussion on Procedural Safeguards, see section 5.1.2

⁹⁵ UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994) (Online)

⁹⁶ UNHCR, U.S. Committee for Refugees *World Refugee Survey 2000 - Austria* (2000) (Online)

⁹⁷ Report on the application of the Dublin II Regulation in Europe (2006) (Online)

⁹⁸ Minimum Standards for the Reception of Asylum Seekers (2003b)

⁹⁹ *ibid.* Art. 7.3

¹⁰⁰ Report on the application of the Dublin II Regulation in Europe (2006) (Online)

of the ECHR can not be accepted by the Member States as it would be contrary to their international obligations. The Dublin Regulation does not contain a specific provision on detention and the implementation of the Reception Directive must be taken into consideration by Member States who wish to return an asylum seeker to a country that practises systematic or unnecessary detention of returnees.

5.2 Concluding remarks

When return under the Dublin Regulation takes place, several concerns arise. Access to procedures and procedural safeguards must be guaranteed in order not to violate international obligations. It is crucial that the sending Member States are fully aware of the reception conditions in the receiving States and that they take this knowledge into consideration before any return takes place.

It is therefore of importance to point out that both the Reception Directive and the Dublin Regulation refers to human rights documents and for an in depth discussion on detention one must consider the implementation of the Reception Directive as crucial.¹⁰¹ Insufficient safeguards of procedural rights, persecution of asylum applicants, systematic detention and severely stressful situations for the returnees might all be reasons, separately or together, for Member States not to return a person to such conditions as it would be in violation of the ECHR, UNCAT, ICCPR and the 1951 Convention and their articles on the principle of non-refoulement.¹⁰²

¹⁰¹ Minimum Standards for the Reception of Asylum Seekers (2003b)

¹⁰² See Part I, Chapter 1 & 2

6. Asylum Procedures Directive

6.1 Content of the Asylum Procedures Directive

This chapter will scrutinise the Asylum Procedures Directive¹⁰³ by examining the rules regulating the application of Safe Third Country, the Safe Country of Origin as well as the rules governing the application of First Country of Asylum. The Safe Third Country concept was first codified in the 1990 Dublin Convention as it allowed Member States to “*retain the right, pursuant to its national laws, to send an applicant for asylum to a third state, in compliance with the provisions of the Geneva Convention as amended by the New York Protocol*”.¹⁰⁴ Before the Asylum Procedures Directive was adopted, the European Council, the European Parliament and the Economic and Social Committee were consulted.¹⁰⁵ However, the Asylum Procedures Directive received harsh critic from both NGO`s and UNHCR and before the adoption many suggestions for improvement was presented. The Asylum Procedures Directive is considered to be a first measure towards a uniform procedure that should be applied throughout the EU¹⁰⁶ and it gives Member States the opportunity to collectively reduce secondary movements of asylum seekers.¹⁰⁷ In recent years, many countries have made increasing use of safe third countries and lists have been compiled of countries, which are generally considered as safe. Asylum applicants are generally refused access to procedures in a Member State, if they have already passed through a country which the Member State have on its list of safe countries.¹⁰⁸ According to UDHR¹⁰⁹, article 14, everyone has the right to leave their country and apply for asylum in other States. This right is a vital part of refugee protection and can therefore not be

¹⁰³ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005)

¹⁰⁴ Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities of 15 June 1990 (1997)

¹⁰⁵ Treaty of Amsterdam (1997) Article 67: 1. *During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.*

¹⁰⁶ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Preamble paragraph 4 and 5.

¹⁰⁷ *ibid.* Preamble paragraph 6.

¹⁰⁸ Legomsky (2003)

¹⁰⁹ Universal Declaration of Human Rights (1948) Art. 14

undermined by general refusals of asylum applicants.¹¹⁰ Furthermore, the non-refoulement principle includes a prohibition of rejection at the border, making general refusals a contrary practise which might constitute a violation of article 33 of the 1951 Convention as well as a violation of ECHR and its article 3.¹¹¹

The Asylum Procedures Directive is an overly complicated document with confusing statements regarding admissibility tests and decision-making criteria on the merits of the application. It contains a wide range of multiple and different procedures, several exceptions which again are subject to exceptions. The exceptions seem to allow Member States to derogate from the very purpose of the Asylum Procedures Directive, namely the minimum procedural standards. A document that should facilitate Member States by being a harmonising instrument and, furthermore, a document which might have the impact on the life or death of asylum applicants should be absolutely clear, there should be no room for misinterpretation or misunderstanding.¹¹² The question is if the Directive, if implemented by the Member States, lead to a possible violation of the non-refoulement principle.

6.1.1 The Safe Third Country Concept

Safe Third Country is a country where the applicant could or should have applied for protection and it is normally a State outside the territory of the EU. For a third country to be considered as safe, the Asylum Procedures Directive demands the fulfilment of certain criteria, among them, the respect for fundamental human rights and in particular the rights set out by the Charter of Fundamental Rights of the European Union. However, as stated in the Dublin Regulation, any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the 1951 Convention.¹¹³ The minimum standards laid down in the Asylum Procedures Directive are thereby voided, would a Member State have a national law providing other standards. In its preamble, the Asylum Procedures Directive refers to the Tampere Conclusions and specifically points out the importance of the principle of non-refoulement. This is also stated

¹¹⁰ See Section 5.1.2

¹¹¹ See Section 2.1.2

¹¹² Comments from the European Council on Refugees and Exiles on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004 (2005) (Online)

¹¹³ Establishing the Criteria and Mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003a) Art. 3.3

in the article regulating the use of Safe Third Countries,¹¹⁴ i.e. the principle of non-refoulement as set out in the 1951 Convention must be respected. The asylum applicant must be protected from removal, from the territory of a Member State towards a third country whereas his right to freedom from persecution and torture, inhuman and degrading treatment could be threatened, all in accordance with public international law. Furthermore, the asylum applicant must be able to apply for refugee status, and if found a refugee, he must receive protection in accordance with the 1951 Convention. This should be ensured by competent authorities upon applying the Safe Third Country Concept.¹¹⁵ This set of minimal criteria, such as respect of fundamental human rights, is of great importance. However, there are many concerns raised by ECRE. Mere ratification of international treaties such as the 1951 Convention does not provide enough safeguards, ECRE argues. The practice and implementation of human rights treaties must be taken into consideration. Protection against refoulement is not the only right a refugee should be granted, refugee status in accordance with the 1951 Convention requires more.¹¹⁶

Similarly, the UNHCR points at this fact, that the minimalism of Article 27 does not provide for protection other than freedom from persecution, torture, inhuman and degrading treatment, as well as protection against refoulement and argues that some other factors should be considered. The criteria and considerations of Article 27 do not ensure effective protection, taking into account respect for other basic standards in international human rights law and the 1951 Convention. The UNHCR thereby argues that the EU Member States absolve themselves of their obligations.¹¹⁷ ECRE points out that the third country must be able to readmit the asylum applicant, examine their claims in a fair and efficient procedure and grant effective protection.¹¹⁸

The Asylum Procedures Directive demands that national rules be laid down in order to establish a reasonable connection between the asylum applicant and the third country concerned. It is not specified what a reasonable connection would be.¹¹⁹ UNHCR ExCom

¹¹⁴ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Art. 27

¹¹⁵ *ibid.* Art. 27.1(a-d)

¹¹⁶ Comments from ECRE on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004. (2004b) (Online)

¹¹⁷ Note on key issues of concern to UNHCR on the draft Asylum Procedures Directive (2004a)

¹¹⁸ Comments from ECRE on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004. (2004b)

¹¹⁹ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Art. 27.2 (a)

Conclusion no.15 recommends that a “close connection” to the third country must be presented, such as family ties and/or close substantial cultural ties. Additionally, it is recommended that the receiving State should take into account, as far as possible, the asylum applicants wish to lodge his claim in a particular State.¹²⁰ ECRE calls for Member States to assume responsibility for the asylum applicant if he has the above-mentioned ties and in addition, if he has poor physical or psychological health or otherwise belongs to a particularly vulnerably group. Mere transit in a country, which has been for a limited time and the sole purpose with the stay was to reach the final destination State, should not be considered as a meaningful link or reasonable connection to the third country.¹²¹ UNHCR concurs, transit should not be regarded as a close connection, unless it is based on a formal agreement for the allocation of responsibility for determining refugee status between countries with *comparable asylum systems and standards* [emphasis added by author]. In all other circumstances, UNHCR argues that transit should not be a defining but an additional requirement. The UNHCR states that the concept of safe third country should not be applied if the links or connections, such as close family or cultural ties, of the asylum applicants to the EU Member States, are stronger than to those of the third country.¹²²

The Asylum Procedures Directive further demands that rules on methodology are laid down in national legislation, meaning that competent authorities should satisfy themselves that the safe third country concept may be applied to a particular country or to a particular asylum applicant. The Asylum Procedures Directive leaves it open for the Member States to consider this on a case by case basis or by a presumption that a third country is generally considered to be safe.¹²³ ECRE is worried that this will lead to a generalised determination of safety by Member States.¹²⁴ UNHCR does not object to the notion of designating safe third countries, if this is based on sound criteria establishing a general presumption of safety. The UNHCR, however, points out the importance of an effective opportunity to rebut the presumption, for the asylum applicant, that the third country is safe.¹²⁵ The opportunity to rebut the

¹²⁰ Executive Committee General Conclusions (1979-2004)

¹²¹ Comments from ECRE on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004. (2004b)

¹²² Note on key issues of concern to UNHCR on the draft Asylum Procedures Directive (2004a)

¹²³ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Art. 27.2 (b)

¹²⁴ Comments from ECRE on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004. (2004b)

¹²⁵ Note on key issues of concern to UNHCR on the draft Asylum Procedures Directive (2004a)

presumption of safety must be given to each individual asylum applicant, as it is an essential safeguard against refoulement.

The Asylum Procedures Directive demands that Member States must lay down national rules in accordance with international human rights law, allowing an individual examination of whether a third country is safe for a particular asylum applicant. And, as a minimum, it must permit the applicant to challenge the application of the safe third country concept on the grounds that he would be subject to torture, inhuman or degrading treatment.¹²⁶ The rules for an effective remedy are laid down in the Asylum Procedures Directive,¹²⁷ and the asylum applicant may, if the Member State has so decided, have access to free legal advice but only if his appeal are likely to succeed.¹²⁸ UNHCR's point of view is that the right to legal assistance and representation is an essential safeguard in the complex system of European asylum procedures and that this is required throughout the procedures. Free legal assistance, however, could be restricted only to asylum applicants without adequate financial means and the amounts of legal assistance could be limited to the average cost of assistance for each relevant step in the procedure, according to the UNHCR.¹²⁹ ECRE has expressed grave concern regarding the absence of clear wording guaranteeing an individual examination in all cases before an application can be declared inadmissible on the basis of this concept. The lack of guarantee for an individual examination, as well as failure to explicitly provide for a right to appeal with suspensive effect, may, according to ECRE, result in the adoption of national legislation permitting unlawful refoulement or chain refoulement of asylum applicants.¹³⁰ Member States must therefore be on the alert when adopting national laws and, furthermore, they must guarantee that public international law is respected when the law is carried out in practise.

According to the Asylum Procedures Directive, Member States, must inform the asylum applicant when implementing a decision solely based on Article 27.¹³¹ The asylum applicant

¹²⁶ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Art.27.2(c)

¹²⁷ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Art. 38 on procedural rules and Art.39 on effective remedy

¹²⁸ *ibid.* Art. 15

¹²⁹ Note on key issues of concern to UNHCR on the draft Asylum Procedures Directive (2004a)

¹³⁰ Comments from ECRE on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004. (2004b)

¹³¹ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Art. 27.3 (a)

should be informed accordingly and he should be provided with a document informing the authorities of the third country that the application has not been examined in substance. This information should be in the language of the third country. If the third country would refuse to (re-) admit the asylum applicant, the responsibility to examine his application rests upon the Member State in which he has claimed asylum.¹³² ECRE is satisfied with the fact that the asylum applicant will be provided with documents informing the receiving third country that his application has not been examined in substance and that the Asylum Procedures Directive clearly states that the responsibility will rest upon the Member State in which the asylum applicant has claimed asylum, would the third country reject to (re-) admit him.

Unfortunately, Article 27 (4) fails to specify that the asylum applicant should be guaranteed access to asylum procedures in the third country; it only states (re-) admittance to its territory. This would most likely not be an issue if the transfer of asylum applicants to third countries were conditional on the grounds that asylum applicants would be guaranteed access to asylum determination procedures.¹³³ It is not specified that the applicant should be informed in a language he understands, only that he should be informed accordingly.

About one year before the Asylum Procedures Directive was adopted ECRE published the following recommendations:

“ECRE would reiterate its view that application of the safe third country concept should be strictly limited, and furthermore that it is impossible at the current time to envisage its proper application in relation to many of the countries on the periphery of or outside the European Union. However, if the safe third country concept is to remain (to be considered within an individual examination of the claim in a procedure with minimum safeguards), the criteria and requirements in Article 27 must clearly be defined and that a minimum, they include:

- (a) Ratification and implementation of the 1951 Convention and other international human right treaties;*
- (b) Existence of an asylum procedure in place leading to the recognition of refugee status;*

¹³² *ibid.* Art.27.3

¹³³ Comments from ECRE on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004. (2004b)

- (c) *Explicit consent of the third country to (re-) admit the asylum seeker and to provide for her full access to a fair and efficient determination procedure before any transfer may take place;*
- (d) *Close link of the applicant with the third country, such as family ties. Mere transit through a country does not constitute a meaningful link.*
- (e) *Rebuttability of the presumption of safety.*¹³⁴

It remains to see how the Member States will design their national laws regarding the safe third country concept, the outcome must, by all means, be in compliance with public international law as it succeeds national legislation.

6.1.2 Minimum common list of third countries regarded as safe countries of origin

The Asylum Procedures Directive, as well as the Reception Conditions Directive¹³⁵, the Dublin Regulation¹³⁶, and the Qualification Directive¹³⁷ should create a minimum standard that Member States must adhere to. It should be possible for Member States to keep or introduce a higher standard than proposed for in the newly adopted CEAS.

Article 29 of the Asylum Procedures Directive provides for the creation of a minimum common list of third countries, which should be considered as safe countries of origin. Third countries are normally countries outside the EU and safe country of origin means that the asylum applicant arrives from a country in which he holds his nationality or was living, and that this country is considered as safe. The Asylum Procedures Directive should lay down minimum standards, meaning that Member States could introduce or keep higher standards, however, Article 29 requires Member States to comply with the list, regarding safe countries of origin, and perhaps this might force the Members to disregard their own standards.

According to ECRE this is the first time EU Member States are required to dilute their standards of protection, if higher, because of the imposed Asylum Procedures Directive.

Before the adoption of the minimum common list of third countries that should be regarded as safe countries of origin, certain criteria must be considered, according to Article 29. This would have been a great opportunity for the designers of the Asylum Procedures Directive to set criteria high enough to ensure that human rights and, in particular, refugee protection

¹³⁴ *ibid.*

¹³⁵ Minimum Standards for the Reception of Asylum Seekers (2003b)

¹³⁶ Establishing the Criteria and Mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003a)

¹³⁷ Minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004)

could be guaranteed. Unfortunately, the criteria demanded are not enough. Annex II of the Asylum Procedures Directive states that a country of origin should be considered as safe when general political circumstances can show that there is no general or consistently persecution. In addition, the basis of the legal situation and the application of law within a democratic system should indicate a good human rights record. Furthermore, there must be no risk of torture, inhuman and degrading treatment as well as no threat by reason of indiscriminate violence in situations of international or internal armed conflicts as stated in the criteria in Annex II of the Directive.

It is imperative to refugee protection that no one is sent to a situation in which he would face the risk of treatment contrary to public international law. As stated in Chapter 1 and 2, and, in particular, as interpreted by the Court, the principle of non-refoulement is absolute.

Annex II also points out that the principle of non-refoulement must be respected and that the safe country of origin must be able to provide for a system of effective remedies against violations of rights and freedoms.

The weakness of this Article lies in the general presumption that a country may be considered as safe. The position taken by UNHCR on the designation of safe countries of origin is weak, as it does not object in principle to the notion when based on criteria establishing a general presumption of safety.¹³⁸ The individual must, however, have the possibility to rebut such general presumptions according to UNHCR.¹³⁹ The Asylum Procedures Directive provides the individual asylum applicant with the possibility to rebut presumption of safety but it does not mention the benefit of doubt, and that the burden of proof lies exclusively with the asylum applicant. AI is worried that the asylum applicants must overcome an unreasonable presumption against the validity of their claim.¹⁴⁰

Before a list of safe countries of origin might be created the Commission shall consider information from Member States, use its own information and only if necessary, consider information from UNHCR or other relevant international organisations.¹⁴¹ With the mandate of UNHCR and not at least, when considering the expertise and insight which UNHCR possesses, it is unfortunate that information from them only should be considered if necessary.

¹³⁸ Note on key issues of concern to UNHCR on the draft Asylum Procedures Directive (2004a)

¹³⁹ *ibid.*

¹⁴⁰ Amnesty International's concerns regarding an EU list of safe countries of origin (2006) (Online)

¹⁴¹ Minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004)

AI believes that a list of safe countries of origin could lead to violations of Article 3 of the 1951 Convention¹⁴² that prohibits discrimination on the grounds of nationality; furthermore, they are concerned that the use of a common list might restrict access to regular asylum procedures. Dismissing an asylum applicant on the ground of his nationality and on the basis of a general presumption of safety might lead to a violation of the principle of non-refoulement. At the time of the writing no common list of countries has been adopted. It would be reasonable to recommend the Council not to pursue such a task as the safeguards is weak and the entire concept of safe country of origin might jeopardise the life and freedom of asylum applicants. Furthermore, the EU should proceed as a good example towards its neighbours and other regions. This cannot be achieved if the EU insists on using the lowest minimum standards and as this would not be enough, allows its Member States to derogate from those standards. The principle of non-refoulement is absolute and can not be bargained with; Member States cannot afford to send a person back to a country in which he would face the risk of treatment contrary to customary international law.

6.1.3 The safe country of origin concept

For a third country to be considered as a safe country of origin it basically must fulfil the criteria as in the above-mentioned Article 27. In addition, the asylum applicant must have a nationality in that country, or if stateless, he must formerly have inhabited that country. The asylum applicant must not have submitted serious grounds for a reconsideration of the safety in his country for his particular circumstance.¹⁴³ Has the Member State received an application of protection, it should consider it as unfounded¹⁴⁴ if the asylum applicants originate from a country generally considered as safe as in accordance with Article 29.¹⁴⁵ Member States shall lay down rules and modalities in its national legislation on the application of safe countries of origin.¹⁴⁶ The burden of proof will lie entirely on the asylum applicant if he will be made responsible for submitting that the country is not safe. UNHCR has expressed its concern regarding this as well as pointed out that the safe country of origin

¹⁴² The 1951 Convention relating to the Status of Refugees (1951) Art. 3 The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

¹⁴³ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Art.31.1(a-b)

¹⁴⁴ *ibid.* 31.2

¹⁴⁵ *ibid.* Art. 29

¹⁴⁶ *ibid.* Art.31.3

should be a procedural tool that should offer a rebuttal presumption of safety. UNHCR argues that Article 31 could serve to prioritise or accelerate examination procedures but it should guarantee that each individual application receives a full examination on its own merits.¹⁴⁷ ECRE strongly opposed the concept of safe country of origin already before its adoption, and argued that this Article does not provide for an adequate examination of whether a particular country is safe for the individual applicant. ECRE further expressed its concern regarding the burden of proof and asked for the deletion of the entire concept. The most obvious weakness of this article is that the asylum application should be considered as unfounded if the asylum applicants originate from a country generally considered as safe. As we have seen in Article 28 applications might be considered as unfounded on several grounds, this in itself might lead to a violation of international obligations, and particular the principle of non-refoulement, if great precautions is not taken by the Member States.

6.1.4 National designation of third countries as safe countries of origin

Continuing to consider the Asylum Procedures Directive and with the interesting articles mentioned above fresh in mind, Article 30 is highly interesting, as there will be an analysis of the risk of refoulement in connection with the use of safe countries of origin. One should keep in mind why the EU would like to use this concept, not only will it decrease the numbers of asylum applicants arriving at the territory of the EU, it might also have a deterring effect. The eloquent expression regarding burden-sharing and improved protection of refugees can become slightly threadbare if the EU charges its neighbours with high numbers of rejected asylum applicants. Article 30 provides for a national designation of third countries as safe countries of origin. Not only may Member States retain legislation it had before adopting the Asylum Procedures Directive but it may introduce new countries which it consider as safe countries of origin. Again, the purpose of the Asylum Procedures Directive was to create minimum standards. To give the possibility for national designation of countries considered as safe as well as to allow derogation leaves the Asylum Procedures Directive empty. Member States must take into consideration Annex II when designating safe countries of origin. As discussed above Annex II sets some criteria that must be considered before return to a country of origin should take place. The same weakness applies to Article 30 as it does to Article 29, namely that it refers to a general presumption of safety. A Member State must assess whether

¹⁴⁷ UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (2004c) (Online)

a country is a safe country of origin in accordance with the Asylum Procedures Directive¹⁴⁸ and it shall base its designation on a range of sources, including information from other Member States, UNHCR, the Council of Europe and other relevant international organisations.¹⁴⁹ Member States must notify the Commission which countries it has designated as safe countries of origin.

According to Article 30 Member States may designate only part of a country as safe, or a country or part of a country as safe for a specified group of persons in that country. ECRE has expressed its concern regarding this paragraph of Article 30; “*in principle a country cannot be considered ‘safe’ if it is so for only part of the territory. The designation of a safe part of a country does not necessarily signify the existence of a reasonable internal protection alternative*”.¹⁵⁰

This practise, also called internal flight alternatives, is a fairly new concept and should according to UNHCR be used with great precautions.¹⁵¹ Refugee status may be denied if protection could have been afforded in another region of the country of origin but it has to be reasonable, it must be assessed whether the asylum applicant could reasonably have sought protection within his country of nationality. Furthermore, it must be reasonable to consider that he will receive protection, not only from persecution but also that he will enjoy basic human rights standards.¹⁵² As stated earlier, in the examination of the case *Hilal v. United Kingdom*, the Court did not regard the internal flight option as an alternative due to the risk of future persecution. The particular circumstances in this case made the Court hold this opinion. It is not impossible that the Court would hold another opinion if other circumstances had been present. One should also be aware of the fact that there are few cases that actually makes it to the European Court of Human Rights and that not all asylum applicants has the resources it takes to bring a case before the Court.

It is difficult to believe that the test of reasonability can be carried out in a justifiable manner in accelerated procedures, without Court intervention, and one could therefore remain sceptical to the internal flight option. This might decrease the asylum applicants within the

¹⁴⁸ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Art.30.4

¹⁴⁹ *ibid.* Art.30.5

¹⁵⁰ Comments from ECRE on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004. (2004b)

¹⁵¹ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1992) Paragraph 91.

¹⁵² Türk, Volker...[et al.]. Refugee protection in international law : UNHCR's global consultation on international protection, Geneva: UNHCR, (2003) p. 357-415

EU and simultaneously contribute to the large numbers of internally displaced people outside the EU. The risk of refoulement can not be underestimated if Member States deny a full asylum procedure in favour of internal flight options.

UNHCR states that all categories of asylum applicants must have access to asylum procedures, no particular group or category should be denied access because they might originate from a country generally considered as safe by the receiving Member State. This was expressed by UNHCR in May 2004.¹⁵³ Today Member States may, according to the Asylum Procedures Directive, apply the safe country of origin on groups of applicants. Asylum applicants must be granted a personal interview by a neutral decision-making authority and have the possibility to rebut a general presumption of safety. ECRE strongly opposes the entire concept of safe country of origin and asked for the deletion of the article before its adoption.

6.1.5 Unfounded applications

Member States may consider an application for asylum as unfounded¹⁵⁴ if the determining authority has established that the applicant does not qualify for refugee status as in accordance with the Qualification Directive.¹⁵⁵ Any application made by a third country national may be considered as unfounded if he originates from a country designated as a safe country of origin.¹⁵⁶ If regarded as unfounded, in accordance with the Asylum Procedures Directive, or in accordance with national legislation, the application may be processed in an accelerated or prioritised manner.¹⁵⁷ ECRE is worried that the wide scope of accelerated procedures allowed will render standard asylum procedure to an exceptional procedure if at all carried out. An extensive list is offered to Member States who wishes to apply accelerated procedures, such as applications that raise little relevant evidence, applications from a safe country of origin or a safe third country, applicants who cannot prove their identity or nationality, applicants who offer inconsistent information and applicants who fail to file their applications as soon as they had the opportunity to do so.¹⁵⁸ It is clearly worrying that Member States may regard an

¹⁵³ Note on key issues of concern to UNHCR on the draft Asylum Procedures Directive (2004a)

¹⁵⁴ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Art. 23.4 (b)

¹⁵⁵ Minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004)

¹⁵⁶ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) Art. 23.4 (i)

¹⁵⁷ *ibid.* Art. 23.3

¹⁵⁸ *ibid.* Art.23.4 (d-o)

application as unfounded would the asylum applicant leave inconsistent information. The asylum applicant is, in fact, asking for protection from persecution, has he been subject to torture it is reasonable to understand that he leaves inconsistent information and that he might need more time in order to tell his story.¹⁵⁹ This would not be possible for a victim of torture in an accelerated procedure and previous torture experiences can also be a reason why the applicant lingers to file his application. The fact that an asylum applicant does not hold identification papers could be because he could not collect such documents from a persecuting regime and he should not be penalised because of this according to the 1951 Convention.¹⁶⁰

In addition, an asylum applicant must not be penalised because of his failure to file his application instantly.¹⁶¹ The extensive list of possibilities to regard applications as unfounded might in the end result in return of a person back to persecution i.e. it might result with the violation of public international law and, in particular, a violation of the non-refoulement principle.¹⁶² Member States must show precautions when applying the accelerated procedures on the grounds offered in the Asylum Procedures Directive in order not to violate their international obligations. One could regret the so-called minimum standards set out to protect asylum applicants as they might, in the end, be insufficient.

¹⁵⁹ International Guidelines for the Investigation and Documentation of Torture (2002) (Online)

¹⁶⁰ The 1951 Convention relating to the Status of Refugees (1951) Art. 31. 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2 . The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country

¹⁶¹ Türk (2003) p. 186-193

¹⁶² See Part I, Chapter 1 & 2

6.1.6 Border Procedures

Article 35 of the Directive regulates the border procedures by Member States. As we have seen in the previous chapter a state's international obligation begins already when an asylum applicant is standing at its border.¹⁶³ It is, therefore, of great importance that the national border procedures of Member States are in compliance with international law and, in particular, border procedures must allow access for asylum applicants.¹⁶⁴ Without guaranteed access to refugee determination procedures, the entire refugee protection would fail.

Therefore, it is of significant importance to examine Article 35 in relation to the principle of non-refoulement.

According to Article 35, Member States may provide for asylum procedures at the border or in transit zones of their territory. Should no such border or transit zone-procedures exist, Member States may maintain procedures laid down in national legislation and thereby derogate from the basic principles and guarantees of the Asylum Procedures Directive as set out in Chapter II¹⁶⁵ in order to decide at the border or in transit zones as to whether asylum applicants may enter their territory.¹⁶⁶ Asylum applicants must be allowed to remain at the border or in transit zones as well as receive information about their rights and duties, and if necessary, have access to an interpreter.¹⁶⁷ Furthermore, a competent national authority should interview asylum applicants and, if permitted in the national legislation of the Member State concerned, have access to consultation with a legal advisor or if the asylum applicant is an unaccompanied minor, have a representative appointed.¹⁶⁸

It is clearly worrying that Member States may derogate from the minimum standard that the Asylum Procedures Directive aims to establish. Allowing national legislation to supersede the standards set out in the Directive leaves the concept of minimum standard irrelevant. One example can be addressed in order to point out the danger of such possibilities to derogate from minimum standards and in particular from the basic principles and guarantees as set out by the Asylum Procedures Directive;

¹⁶³ See Part I, Chapter 1 & 2

¹⁶⁴ Stenberg, Gunnell. Non-expulsion and non-refoulement : the prohibition against removal of refugees with special reference to articles 32 and 33 of the 1951 Convention relating to the status of refugees, Uppsala: Iustus, (1989).p. 176-178

¹⁶⁵ Minimum standards on procedures in Member States for granting and withdrawing refugee status (2005)

¹⁶⁶ *ibid.* Art.35.2

¹⁶⁷ *ibid.* Art.35.3(a-c)

¹⁶⁸ *ibid.* Art.35.3(d-f)

Spain applies an inadmissibility procedure at the border of its territory and at major airports. This procedure is due to take place within a timeframe of seventy-two hours from the moment an asylum applicant makes his request for protection. He is assigned a lawyer provided for by the Office of Asylum and Refugees (OAR). Lawyers representing refugee-supporting organisations are prohibited by the OAR to speak to asylum applicants unless the applicants specifically request assistance from that specific organisation. The lawyers provided for by the OAR are “on call” and are seldom experts in the field of refugee law. An examiner from the OAR then interviews the applicant, evaluates the case and prepares a recommendation on admissibility or inadmissibility. A copy of the recommendation is sent to the UNHCR representative in Madrid and is reviewed by an attorney from the UNHCR. Would the UNHCR disagree the Chief of the OAR Inadmissibility Section reviews the case and she/he decided whether the case is inadmissible. The Chief of the Inadmissible Section prepares a recommendation to the Minister of Interior and the Minister must decide within the seventy-two hour time frame if the case is inadmissible or not. If the decision is not made within the time frame set out the asylum applicant is allowed to enter Spain in order to have access to regular asylum procedures. If rejected on grounds of inadmissibility at the border the asylum applicant has twenty-four hours to request reconsideration by the same official who made the original determination of inadmissibility. The grounds for inadmissibility can be based on the Dublin Regulation i.e. there is a first country of asylum, which should provide for refugee determination procedure. Other grounds for inadmissibility are: rejection of the asylum applications due to manifestly unfounded claims, low credibility of well-founded fear and, in addition, the applicant might be precluded from refugee status following his conduct. If the appeal of reconsideration is rejected the applicant may appeal to a court but the applicant has no administrative appeal to the Inter Ministerial Eligibility Commission (CIAR).¹⁶⁹ During the procedure, the asylum applicant must remain at the border or at the airport and can easily be expelled if the court does not grant stay of removal. According to Spanish legislation, anyone who remains at the airport is considered to be legally outside the territory of Spain. The neighbouring country Portugal has a similar legislation on inadmissibility and together these two countries reject somewhere between 60-70% of all asylum claims as inadmissible. These inadmissibility procedures effectively block access to procedures and are, according to

¹⁶⁹ CIAR contains representatives from the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of the Interior, the Ministry of Labour, and the Ministry of Social Service Affairs

Maryellen Fullerton, a clear violation of international obligations.¹⁷⁰ One can assume that the risk of refoulement must increase when procedures determining inadmissibility are carried out in a tremendously fast and complicated manner with limited possibilities for asylum applicants to have an effective remedy in a fair proceeding. This example clearly shows that the Asylum Procedures Directive does not provide for protection in accordance with international human rights law as it allows Member States to derogate from the minimum standards that should assure that refoulement does not take place. The UNHCR has repeatedly stated that a fair asylum procedure should include a complete personal interview, a chance for asylum applicants to present their claims to a neutral, qualified decision-maker, that asylum applicants must have access to competent interpreters as well as they must be allowed and able to consult with legal representatives and advocates as they prepare their applications.¹⁷¹ As stated in the first chapter, rejection of persons in need of international protection, at the border, is a violation of international human rights law and, in particular, it is a violation of the principle of non-refoulement.

6.2 Concluding remarks

The Asylum Procedures Directive should establish minimum standards of procedures regarding the use of the so-called “third countries”; in addition it should establish procedures regarding admissibility tests, border procedures and other mechanisms that should safeguard the right to seek asylum and the principle of non-refoulement. Unfortunately, most minimum standards presented are subjects to exceptions. Member States must therefore ensure themselves that they do fulfil their international obligations when applying the Asylum Procedures Directive. This document is an overly complicated instrument with weak safeguards regarding the principle of non-refoulement and as there is no room for mistakes, Member States must proceed with great precautions.

¹⁷⁰ Fullerton, Maryellen. *Inadmissible in Iberia: The Fate of Asylum Seekers in Spain and Portugal*, 17 (4) Oxford Journals 659-687 (2005).

¹⁷¹ Executive Committee General Conclusions (1979-2004) in particular No. 8, 1977 and No.30, 1983

7. Conclusion

Since the Second World War, the international community, with the European countries in the forefront, has endeavoured to establish an efficient legal system capable of protecting refugees. The 1951 Convention represents one of the major efforts in that respect. The 1951 Convention provides a definition of people in need of protection and in addition, it offers the principle of non-refoulement. There has been a parallel development of the non-refoulement principle, in international human rights law, and today this principle is considered as a non-derogable rule. Through case law, it becomes evident that the prohibition of return stands even stronger in international human rights law than in refugee law.

All Member States of the EU have assumed international obligations through the signing and ratification of treaties protecting human rights and protecting the rights of refugees. In addition, the Member States are bound to customary international law, which includes the principle of non-refoulement.

The Asylum Procedures Directive and the Dublin Regulation do not, in their provisions and regulations, violate customary international law, nor do they, on the other hand, safeguard the significant provisions institutionalised by ratification of public international law treaties and decades of State practise. It is shown that these two instruments do not provide enough guarantees regarding the rights of refugees. Practises such as systematic detention of asylum seekers, poor conditions at reception centres and the lack of guarantees regarding access to procedures, might all constitute a violation of the non-refoulement principle. People fleeing persecution must have the right to seek asylum in accordance with customary international law, and only the willingness of States can assure this right. Therefore, it is of tremendous importance that the Member States of the EU shoulder this responsibility and reassure that their national laws are in compliance with their assumed international obligations. The scope and meaning of the 1951 Convention cannot be disregarded by the EU. It would be a violation of public international law and the Member States would be considered the offending party. One cannot disregard the benefit of a harmonised asylum system throughout the EU. However, one could certainly urge Member States first to create the necessary conditions, and then design the laws, in accordance with their international obligations. As this analysis has shown, laws have been developed before the necessary conditions, which should protect

asylum seekers arriving at the borders of EU, have been established. Before applying the provisions in the Dublin Regulation and in the Asylum Procedures Directive, Member States must be fully assured that they do not set in motion a chain of events leading to a violation of the principle of non-refoulement. They must make sure that the right to seek asylum is respected through procedural safeguards, protection against persecution, non-return of people in need of international protection and through the respect of the right to liberty and security of the person.

In order to answer the main question in this study, it is certainly tempting, and probably necessary, to perform an analysis of the entire CEAS. Do the two instruments, examined in this study, open for a violation of the principle of non-refoulement? Unfortunately, according to the legal analysis made, the answer appears to be that they do. Would the conclusion be the same following a full examination of the CEAS? Perhaps the outcome would be different, and one could therefore encourage an analysis of the entire CEAS, from a public international law perspective, to be conducted. On the basis of the legal analysis in this thesis it can be concluded that Member States must, by their own means, ensure that they implement their national laws in compliance with their international obligations. The articles in the two overly complicated legal instruments, examined in this thesis, do not provide enough safeguards in relation to the principle of non-refoulement and could therefore lead to a violation by the Member States.

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Appendix I

Council Regulation (EC) No 343/2003

of 18 February 2003

establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63, first paragraph, point (1)(a),

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. In this respect, and without affecting the responsibility criteria laid down in this Regulation, Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals.

(3) The Tampere conclusions also stated that this system should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

(4) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications.

(5) As regards the introduction in successive phases of a common European asylum system that should lead, in the longer term, to a common procedure and a uniform status, valid throughout the Union, for those granted asylum, it is appropriate at this stage, while making the necessary improvements in the light of experience, to confirm the principles underlying the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities(4), signed in Dublin on 15 June 1990 (hereinafter referred to as the Dublin Convention), whose implementation has stimulated the process of harmonising asylum policies.

(6) Family unity should be preserved in so far as this is compatible with the other objectives pursued by establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application.

(7) The processing together of the asylum applications of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly and the decisions taken in respect of them are consistent. Member States should be able to derogate from the responsibility criteria, so as to make it possible to bring family members together where this is necessary on humanitarian grounds.

(8) The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the Treaty establishing the European Community and the establishment of Community policies regarding the conditions of entry and stay of third country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity.

(9) The application of this Regulation can be facilitated, and its effectiveness increased, by bilateral arrangements between Member States for improving communications between competent departments, reducing time limits for procedures or simplifying the processing of requests to take charge or take back, or establishing procedures for the performance of transfers.

(10) Continuity between the system for determining the Member State responsible established by the Dublin Convention and the system established by this Regulation should be ensured. Similarly, consistency should be ensured between this Regulation and Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention(5).

(11) The operation of the Eurodac system, as established by Regulation (EC) No 2725/2000 and in particular the implementation of Articles 4 and 8 contained therein should facilitate the implementation of this Regulation.

(12) With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by obligations under instruments of international law to which they are party.

(13) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(6).

(14) The application of the Regulation should be evaluated at regular intervals.

(15) The Regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union(7). In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18.

(16) Since the objective of the proposed measure, namely the establishment of criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, cannot be sufficiently achieved by the Member States and, given the scale and effects, can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(17) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland gave notice, by letters of 30 October 2001, of their wish to take part in the adoption and application of this Regulation.

(18) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation and is not bound by it nor subject to its application.

(19) The Dublin Convention remains in force and continues to apply between Denmark and the Member States that are bound by this Regulation until such time an agreement allowing Denmark's participation in the Regulation has been concluded,

HAS ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT-MATTER AND DEFINITIONS

Article 1

This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

Article 2

For the purposes of this Regulation:

(a) "third-country national" means anyone who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty establishing the European Community;

- (b) "Geneva Convention" means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;
- (c) "application for asylum" means the application made by a third-country national which can be understood as a request for international protection from a Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless a third-country national explicitly requests another kind of protection that can be applied for separately;
- (d) "applicant" or "asylum seeker" means a third country national who has made an application for asylum in respect of which a final decision has not yet been taken;
- (e) "examination of an asylum application" means any examination of, or decision or ruling concerning, an application for asylum by the competent authorities in accordance with national law except for procedures for determining the Member State responsible in accordance with this Regulation;
- (f) "withdrawal of the asylum application" means the actions by which the applicant for asylum terminates the procedures initiated by the submission of his application for asylum, in accordance with national law, either explicitly or tacitly;
- (g) "refugee" means any third-country national qualifying for the status defined by the Geneva Convention and authorised to reside as such on the territory of a Member State;
- (h) "unaccompanied minor" means unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;
- (i) "family members" means insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States:
- (i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;
- (ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;
- (iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried;
- (j) "residence document" means any authorisation issued by the authorities of a Member State authorising a third-country national to stay in its territory, including the documents substantiating the authorisation to remain in the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period

required to determine the responsible Member State as established in this Regulation or during examination of an application for asylum or an application for a residence permit;

(k) "visa" means the authorisation or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States. The nature of the visa shall be determined in accordance with the following definitions:

(i) "long-stay visa" means the authorisation or decision of a Member State required for entry for an intended stay in that Member State of more than three months;

(ii) "short-stay visa" means the authorisation or decision of a Member State required for entry for an intended stay in that State or in several Member States for a period whose total duration does not exceed three months;

(iii) "transit visa" means the authorisation or decision of a Member State for entry for transit through the territory of that Member State or several Member States, except for transit at an airport;

(iv) "airport transit visa" means the authorisation or decision allowing a third-country national specifically subject to this requirement to pass through the transit zone of an airport, without gaining access to the national territory of the Member State concerned, during a stopover or a transfer between two sections of an international flight.

CHAPTER II

GENERAL PRINCIPLES

Article 3

1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

3. Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention.

4. The asylum seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of this Regulation, its time limits and its effects.

Article 4

1. The process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State.

2. An application for asylum shall be deemed to have been lodged once a form submitted by the applicant for asylum or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible.

3. For the purposes of this Regulation, the situation of a minor who is accompanying the asylum seeker and meets the definition of a family member set out in Article 2, point (i), shall be indissociable from that of his parent or guardian and shall be a matter for the Member State responsible for examining the application for asylum of that parent or guardian, even if the minor is not individually an asylum seeker. The same treatment shall be applied to children born after the asylum seeker arrives in the territory of the Member States, without the need to initiate a new procedure for taking charge of them.

4. Where an application for asylum is lodged with the competent authorities of a Member State by an applicant who is in the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present. The latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for asylum was lodged.

The applicant shall be informed in writing of this transfer and of the date on which it took place.

5. An asylum seeker who is present in another Member State and there lodges an application for asylum after withdrawing his application during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Article 20, by the Member State with which that application for asylum was lodged, with a view to completing the process of determining the Member State responsible for examining the application for asylum.

This obligation shall cease, if the asylum seeker has in the meantime left the territories of the Member States for a period of at least three months or has obtained a residence document from a Member State.

CHAPTER III

HIERARCHY OF CRITERIA

Article 5

1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

2. The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.

Article 6

Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.

Article 7

Where the asylum seeker has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a refugee in a Member State, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.

Article 8

If the asylum seeker has a family member in a Member State whose application has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.

Article 9

1. Where the asylum seeker is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for asylum.

2. Where the asylum seeker is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for asylum, unless the visa was issued when acting for or on the written authorisation of another Member State. In such a case, the latter Member State shall be responsible for examining the application for asylum. Where a Member State first consults the central authority of another Member State, in particular for security reasons, the latter's reply to the consultation shall not constitute written authorisation within the meaning of this provision.

3. Where the asylum seeker is in possession of more than one valid residence document or visa issued by different Member States, the responsibility for examining the application for asylum shall be assumed by the Member States in the following order:

(a) the Member State which issued the residence document conferring the right to the longest period of residency or, where the periods of validity are identical, the Member State which issued the residence document having the latest expiry date;

(b) the Member State which issued the visa having the latest expiry date where the various visas are of the same type;

(c) where visas are of different kinds, the Member State which issued the visa having the longest period of validity, or, where the periods of validity are identical, the Member State which issued the visa having the latest expiry date.

4. Where the asylum seeker is in possession only of one or more residence documents which have expired less than two years previously or one or more visas which have expired less than six months previously and which enabled him actually to enter the territory of a Member State, paragraphs 1, 2 and 3 shall apply for such time as the applicant has not left the territories of the Member States.

Where the asylum seeker is in possession of one or more residence documents which have expired more than two years previously or one or more visas which have expired more than six months previously and enabled him actually to enter the territory of a Member State and where he has not left the territories of the Member States, the Member State in which the application is lodged shall be responsible.

5. The fact that the residence document or visa was issued on the basis of a false or assumed identity or on submission of forged, counterfeit or invalid documents shall not prevent responsibility being allocated to the Member State which issued it. However, the Member State issuing the residence document or visa shall not be responsible if it can establish that a fraud was committed after the document or visa had been issued.

Article 10

1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), including the data referred to in Chapter III of Regulation (EC) No 2725/2000, that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum. This responsibility shall cease 12 months after the date on which the irregular border crossing took place.

2. When a Member State cannot or can no longer be held responsible in accordance with paragraph 1, and where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), that the asylum seeker - who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established - at the time of lodging the application has been previously living for a continuous period of at least five months in a Member State, that Member State shall be responsible for examining the application for asylum.

If the applicant has been living for periods of time of at least five months in several Member States, the Member State where this has been most recently the case shall be responsible for examining the application.

Article 11

1. If a third-country national enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for asylum.

2. The principle set out in paragraph 1 does not apply, if the third-country national lodges his or her application for asylum in another Member State, in which the need for him or her to have a visa for entry into the territory is also waived. In this case, the latter Member State shall be responsible for examining the application for asylum.

Article 12

Where the application for asylum is made in an international transit area of an airport of a Member State by a third-country national, that Member State shall be responsible for examining the application.

Article 13

Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.

Article 14

Where several members of a family submit applications for asylum in the same Member State simultaneously, or on dates close enough for the procedures for determining the Member State responsible to be conducted together, and where the application of the criteria set out in this Regulation would lead to them being separated, the Member State responsible shall be determined on the basis of the following provisions:

(a) responsibility for examining the applications for asylum of all the members of the family shall lie with the Member State which the criteria indicate is responsible for taking charge of the largest number of family members;

(b) failing this, responsibility shall lie with the Member State which the criteria indicate is responsible for examining the application of the oldest of them.

CHAPTER IV

HUMANITARIAN CLAUSE

Article 15

1. Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.

2. In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.

3. If the asylum seeker is an unaccompanied minor who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with his or her relative or relatives, unless this is not in the best interests of the minor.

4. Where the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it.

5. The conditions and procedures for implementing this Article including, where appropriate, conciliation mechanisms for settling differences between Member States concerning the need to unite the persons in question, or the place where this should be done, shall be adopted in accordance with the procedure referred to in Article 27(2).

CHAPTER V

TAKING CHARGE AND TAKING BACK

Article 16

1. The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

(a) take charge, under the conditions laid down in Articles 17 to 19, of an asylum seeker who has lodged an application in a different Member State;

(b) complete the examination of the application for asylum;

(c) take back, under the conditions laid down in Article 20, an applicant whose application is under examination and who is in the territory of another Member State without permission;

(d) take back, under the conditions laid down in Article 20, an applicant who has withdrawn the application under examination and made an application in another Member State;

(e) take back, under the conditions laid down in Article 20, a third-country national whose application it has rejected and who is in the territory of another Member State without permission.

2. Where a Member State issues a residence document to the applicant, the obligations specified in paragraph 1 shall be transferred to that Member State.

3. The obligations specified in paragraph 1 shall cease where the third-country national has left the territory of the Member States for at least three months, unless the third-country national is in possession of a valid residence document issued by the Member State responsible.

4. The obligations specified in paragraph 1(d) and (e) shall likewise cease once the Member State responsible for examining the application has adopted and actually implemented, following the withdrawal or rejection of the application, the provisions that are necessary before the third-country national can go to his country of origin or to another country to which he may lawfully travel.

Article 17

1. Where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within three months of the date on which the application was lodged within the meaning of Article 4(2), call upon the other Member State to take charge of the applicant.

Where the request to take charge of an applicant is not made within the period of three months, responsibility for examining the application for asylum shall lie with the Member State in which the application was lodged.

2. The requesting Member State may ask for an urgent reply in cases where the application for asylum was lodged after leave to enter or remain was refused, after an arrest for an unlawful stay or after the service or execution of a removal order and/or where the asylum seeker is held in detention.

The request shall state the reasons warranting an urgent reply and the period within which a reply is expected. This period shall be at least one week.

3. In both cases, the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 18(3) and/or relevant elements from the asylum seeker's statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.

The rules on the preparation of and the procedures for transmitting requests shall be adopted in accordance with the procedure referred to in Article 27(2).

Article 18

1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of the date on which the request was received.

2. In the procedure for determining the Member State responsible for examining the application for asylum established in this Regulation, elements of proof and circumstantial evidence shall be used.

3. In accordance with the procedure referred to in Article 27(2) two lists shall be established and periodically reviewed, indicating the elements of proof and circumstantial evidence in accordance with the following criteria:

(a) Proof:

(i) This refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary.

(ii) The Member States shall provide the Committee provided for in Article 27 with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs.

(b) Circumstantial evidence:

(i) This refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them.

(ii) Their evidentiary value, in relation to the responsibility for examining the application for asylum shall be assessed on a case-by-case basis.

4. The requirement of proof should not exceed what is necessary for the proper application of this Regulation.

5. If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.

6. Where the requesting Member State has pleaded urgency, in accordance with the provisions of Article 17(2), the requested Member State shall make every effort to conform to the time limit requested. In exceptional cases, where it can be demonstrated that the examination of a request for taking charge of an applicant is particularly complex, the requested Member State may give the reply after the time limit requested, but in any case within one month. In such situations the requested Member State must communicate its decision to postpone a reply to the requesting Member State within the time limit originally requested.

7. Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the provisions for proper arrangements for arrival.

Article 19

1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this.

3. The transfer of the applicant from the Member State in which the application for asylum was lodged to the Member State responsible shall be carried out in accordance with the national law of the first Member State, after consultation between the Member States

concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken or of the decision on an appeal or review where there is a suspensive effect.

If necessary, the asylum seeker shall be supplied by the requesting Member State with a laissez passer of the design adopted in accordance with the procedure referred to in Article 27(2).

The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the asylum seeker or of the fact that he did not appear within the set time limit.

4. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

5. Supplementary rules on carrying out transfers may be adopted in accordance with the procedure referred to in Article 27(2).

Article 20

1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:

(a) the request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible;

(b) the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks;

(c) where the requested Member State does not communicate its decision within the one month period or the two weeks period mentioned in subparagraph (b), it shall be considered to have agreed to take back the asylum seeker;

(d) a Member State which agrees to take back an asylum seeker shall be obliged to readmit that person to its territory. The transfer shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect;

(e) the requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible. The decision shall set out the grounds on which it is based. It shall contain details of the time limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision

may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this.

If necessary, the asylum seeker shall be supplied by the requesting Member State with a laissez passer of the design adopted in accordance with the procedure referred to in Article 27(2).

The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the asylum seeker or of the fact that he did not appear within the set time limit.

2. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer or the examination of the application could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

3. The rules of proof and evidence and their interpretation, and on the preparation of and the procedures for transmitting requests, shall be adopted in accordance with the procedure referred to in Article 27(2).

4. Supplementary rules on carrying out transfers may be adopted in accordance with the procedure referred to in Article 27(2).

CHAPTER VI

ADMINISTRATIVE COOPERATION

Article 21

1. Each Member State shall communicate to any Member State that so requests such personal data concerning the asylum seeker as is appropriate, relevant and non-excessive for:

- (a) the determination of the Member State responsible for examining the application for asylum;
- (b) examining the application for asylum;
- (c) implementing any obligation arising under this Regulation.

2. The information referred to in paragraph 1 may only cover:

- (a) personal details of the applicant, and, where appropriate, the members of his family (full name and where appropriate, former name; nicknames or pseudonyms; nationality, present and former; date and place of birth);
- (b) identity and travel papers (references, validity, date of issue, issuing authority, place of issue, etc.);

(c) other information necessary for establishing the identity of the applicant, including fingerprints processed in accordance with Regulation (EC) No 2725/2000;

(d) places of residence and routes travelled;

(e) residence documents or visas issued by a Member State;

(f) the place where the application was lodged;

(g) the date any previous application for asylum was lodged, the date the present application was lodged, the stage reached in the proceedings and the decision taken, if any.

3. Furthermore, provided it is necessary for the examination of the application for asylum, the Member State responsible may request another Member State to let it know on what grounds the asylum seeker bases his application and, where applicable, the grounds for any decisions taken concerning the applicant. The Member State may refuse to respond to the request submitted to it, if the communication of such information is likely to harm the essential interests of the Member State or the protection of the liberties and fundamental rights of the person concerned or of others. In any event, communication of the information requested shall be subject to the written approval of the applicant for asylum.

4. Any request for information shall set out the grounds on which it is based and, where its purpose is to check whether there is a criterion that is likely to entail the responsibility of the requested Member State, shall state on what evidence, including relevant information from reliable sources on the ways and means asylum seekers enter the territories of the Member States, or on what specific and verifiable part of the applicant's statements it is based. It is understood that such relevant information from reliable sources is not in itself sufficient to determine the responsibility and the competence of a Member State under this Regulation, but it may contribute to the evaluation of other indications relating to the individual asylum seeker.

5. The requested Member State shall be obliged to reply within six weeks.

6. The exchange of information shall be effected at the request of a Member State and may only take place between authorities whose designation by each Member State has been communicated to the Commission, which shall inform the other Member States thereof.

7. The information exchanged may only be used for the purposes set out in paragraph 1. In each Member State such information may, depending on its type and the powers of the recipient authority, only be communicated to the authorities and courts and tribunals entrusted with:

(a) the determination of the Member State responsible for examining the application for asylum;

(b) examining the application for asylum;

(c) implementing any obligation arising under this Regulation.

8. The Member State which forwards the information shall ensure that it is accurate and up-to-date. If it transpires that that Member State has forwarded information which is inaccurate or which should not have been forwarded, the recipient Member States shall be informed thereof immediately. They shall be obliged to correct such information or to have it erased.

9. The asylum seeker shall have the right to be informed, on request, of any data that is processed concerning him.

If he finds that this information has been processed in breach of this Regulation or of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data(8), in particular because it is incomplete or inaccurate, he is entitled to have it corrected, erased or blocked.

The authority correcting, erasing or blocking the data shall inform, as appropriate, the Member State transmitting or receiving the information.

10. In each Member State concerned, a record shall be kept, in the individual file for the person concerned and/or in a register, of the transmission and receipt of information exchanged.

11. The data exchanged shall be kept for a period not exceeding that which is necessary for the purposes for which it is exchanged.

12. Where the data is not processed automatically or is not contained, or intended to be entered, in a file, each Member State should take appropriate measures to ensure compliance with this Article through effective checks.

Article 22

1. Member States shall notify the Commission of the authorities responsible for fulfilling the obligations arising under this Regulation and shall ensure that those authorities have the necessary resources for carrying out their tasks and in particular for replying within the prescribed time limits to requests for information, requests to take charge of and requests to take back asylum seekers.

2. Rules relating to the establishment of secure electronic transmission channels between the authorities mentioned in paragraph 1 for transmitting requests and ensuring that senders automatically receive an electronic proof of delivery shall be established in accordance with the procedure referred to in Article 27(2).

Article 23

1. Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness. Such arrangements may relate to:

(a) exchanges of liaison officers;

(b) simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back asylum seekers;

2. The arrangements referred to in paragraph 1 shall be communicated to the Commission. The Commission shall verify that the arrangements referred to in paragraph 1(b) do not infringe this Regulation.

CHAPTER VII

TRANSITIONAL PROVISIONS AND FINAL PROVISIONS

Article 24

1. This Regulation shall replace the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (Dublin Convention).

2. However, to ensure continuity of the arrangements for determining the Member State responsible for an application for asylum, where an application has been lodged after the date mentioned in the second paragraph of Article 29, the events that are likely to entail the responsibility of a Member State under this Regulation shall be taken into consideration, even if they precede that date, with the exception of the events mentioned in Article 10(2).

3. Where, in Regulation (EC) No 2725/2000 reference is made to the Dublin Convention, such reference shall be taken to be a reference made to this Regulation.

Article 25

1. Any period of time prescribed in this Regulation shall be calculated as follows:

(a) where a period expressed in days, weeks or months is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question;

(b) a period expressed in weeks or months shall end with the expiry of whichever day in the last week or month is the same day of the week or falls on the same date as the day during which the event or action from which the period is to be calculated occurred or took place. If, in a period expressed in months, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month;

(c) time limits shall include Saturdays, Sundays and official holidays in any of the Member States concerned.

2. Requests and replies shall be sent using any method that provides proof of receipt.

Article 26

As far as the French Republic is concerned, this Regulation shall apply only to its European territory.

Article 27

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall draw up its rules of procedure.

Article 28

At the latest three years after the date mentioned in the first paragraph of Article 29, the Commission shall report to the European Parliament and the Council on the application of this Regulation and, where appropriate, shall propose the necessary amendments. Member States shall forward to the Commission all information appropriate for the preparation of that report, at the latest six months before that time limit expires.

Having submitted that report, the Commission shall report to the European Parliament and the Council on the application of this Regulation at the same time as it submits reports on the implementation of the Eurodac system provided for by Article 24(5) of Regulation (EC) No 2725/2000.

Article 29

This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.

It shall apply to asylum applications lodged as from the first day of the sixth month following its entry into force and, from that date, it will apply to any request to take charge of or take back asylum seekers, irrespective of the date on which the application was made. The Member State responsible for the examination of an asylum application submitted before that date shall be determined in accordance with the criteria set out in the Dublin Convention.

This Regulation shall be binding in its entirety and directly applicable in the Member States in conformity with the Treaty establishing the European Community.

Done at Brussels, 18 February 2003.

For the Council

The President

N. Christodoulakis

(1) OJ C 304 E, 30.10.2001, p. 192.

(2) Opinion of 9 April 2002 (not yet published in the Official Journal).

- (3) OJ C 125, 27.5.2002, p. 28.
- (4) OJ C 254, 19.8.1997, p. 1.
- (5) OJ L 316, 15.12.2000, p. 1.
- (6) OJ L 184, 17.7.1999, p. 23.
- (7) OJ C 364, 18.12.2000, p. 1.
- (8) OJ L 281, 23.11.1995, p. 31.

Appendix II

Council Directive 2005/85/EC

of 1 December 2005

on minimum standards on procedures in Member States for granting and withdrawing refugee status

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point (1)(d) of the first paragraph of Article 63 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the European Economic and Social Committee [3],

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967 (Geneva Convention), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Tampere Conclusions provide that a Common European Asylum System should include, in the short term, common standards for fair and efficient asylum procedures in the Member States and, in the longer term, Community rules leading to a common asylum procedure in the European Community.

(4) The minimum standards laid down in this Directive on procedures in Member States for granting or withdrawing refugee status are therefore a first measure on asylum procedures.

(5) The main objective of this Directive is to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status.

(6) The approximation of rules on the procedures for granting and withdrawing refugee status should help to limit the secondary movements of applicants for asylum between Member States, where such movement would be caused by differences in legal frameworks.

(7) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is a refugee within the meaning of Article 1(A) of the Geneva Convention.

(8) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(9) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(10) It is essential that decisions on all applications for asylum be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or receives the necessary training in the field of asylum and refugee matters.

(11) It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive.

(12) The notion of public order may cover a conviction for committing a serious crime.

(13) In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention, every applicant should, subject to certain exceptions, have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure. Moreover, the procedure in which an application for asylum is examined should normally provide an applicant at least with the right to stay pending a decision by the determining authority, access to the services of an interpreter for submitting his/her case if interviewed by the authorities, the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) or with any organisation working on its behalf, the right to appropriate notification of a decision, a motivation of that decision in fact and in law, the opportunity to consult a legal adviser or other counsellor, and the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand.

(14) In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability. In this context, the best interests of the child should be a primary consideration of Member States.

(15) Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant.

(16) Many asylum applications are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant. Member States should be able to keep existing procedures adapted to the specific situation of these applicants at the border. Common rules should be defined on possible exceptions made in these circumstances to the guarantees normally enjoyed by applicants. Border procedures should mainly apply to those applicants who do not meet the conditions for entry into the territory of the Member States.

(17) A key consideration for the well-foundedness of an asylum application is the safety of the applicant in his/her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications.

(18) Given the level of harmonisation achieved on the qualification of third country nationals and stateless persons as refugees, common criteria for designating third countries as safe countries of origin should be established.

(19) Where the Council has satisfied itself that those criteria are met in relation to a particular country of origin, and has consequently included it in the minimum common list of safe countries of origin to be adopted pursuant to this Directive, Member States should be obliged to consider applications of persons with the nationality of that country, or of stateless persons formerly habitually resident in that country, on the basis of the rebuttable presumption of the safety of that country. In the light of the political importance of the designation of safe countries of origin, in particular in view of the implications of an assessment of the human rights situation in a country of origin and its implications for the policies of the European Union in the field of external relations, the Council should take any decisions on the establishment or amendment of the list, after consultation of the European Parliament.

(20) It results from the status of Bulgaria and Romania as candidate countries for accession to the European Union and the progress made by these countries towards membership that they should be regarded as constituting safe countries of origin for the purposes of this Directive until the date of their accession to the European Union.

(21) The designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her.

(22) Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies as a refugee in accordance with Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country

nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [4], except where the present Directive provides otherwise, in particular where it can be reasonably assumed that another country would do the examination or provide sufficient protection. In particular, Member States should not be obliged to assess the substance of an asylum application where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to this country.

(23) Member States should also not be obliged to assess the substance of an asylum application where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country. Member States should only proceed on this basis where this particular applicant would be safe in the third country concerned. In order to avoid secondary movements of applicants, common principles for the consideration or designation by Member States of third countries as safe should be established.

(24) Furthermore, with respect to certain European third countries, which observe particularly high human rights and refugee protection standards, Member States should be allowed to not carry out, or not to carry out full examination of asylum applications regarding applicants who enter their territory from such European third countries. Given the potential consequences for the applicant of a restricted or omitted examination, this application of the safe third country concept should be restricted to cases involving third countries with respect to which the Council has satisfied itself that the high standards for the safety of the third country concerned, as set out in this Directive, are fulfilled. The Council should take decisions in this matter after consultation of the European Parliament.

(25) It follows from the nature of the common standards concerning both safe third country concepts as set out in this Directive, that the practical effect of the concepts depends on whether the third country in question permits the applicant in question to enter its territory.

(26) With respect to the withdrawal of refugee status, Member States should ensure that persons benefiting from refugee status are duly informed of a possible reconsideration of their status and have the opportunity to submit their point of view before the authorities can take a motivated decision to withdraw their status. However, dispensing with these guarantees should be allowed where the reasons for the cessation of the refugee status is not related to a change of the conditions on which the recognition was based.

(27) It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.

(28) In accordance with Article 64 of the Treaty, this Directive does not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

(29) This Directive does not deal with procedures governed by Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the

Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [5].

(30) The implementation of this Directive should be evaluated at regular intervals not exceeding two years.

(31) Since the objective of this Directive, namely to establish minimum standards on procedures in Member States for granting and withdrawing refugee status cannot be sufficiently attained by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve this objective.

(32) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom has notified, by letter of 24 January 2001, its wish to take part in the adoption and application of this Directive.

(33) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified, by letter of 14 February 2001, its wish to take part in the adoption and application of this Directive.

(34) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

Article 2

Definitions

For the purposes of this Directive:

(a) "Geneva Convention" means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;

(b) "application" or "application for asylum" means an application made by a third country national or stateless person which can be understood as a request for international protection from a Member State under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately;

(c) "applicant" or "applicant for asylum" means a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;

(d) "final decision" means a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and which is no longer subject to a remedy within the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome, subject to Annex III to this Directive;

(e) "determining authority" means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I;

(f) "refugee" means a third country national or a stateless person who fulfils the requirements of Article 1 of the Geneva Convention as set out in Directive 2004/83/EC;

(g) "refugee status" means the recognition by a Member State of a third country national or stateless person as a refugee;

(h) "unaccompanied minor" means a person below the age of 18 who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom, and for as long as he/she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he/she has entered the territory of the Member States;

(i) "representative" means a person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests;

(j) "withdrawal of refugee status" means the decision by a competent authority to revoke, end or refuse to renew the refugee status of a person in accordance with Directive 2004/83/EC;

(k) "remain in the Member State" means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for asylum has been made or is being examined.

Article 3

Scope

1. This Directive shall apply to all applications for asylum made in the territory, including at the border or in the transit zones of the Member States, and to the withdrawal of refugee status.
2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.
3. Where Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other kinds of international protection given under the circumstances defined by Article 15 of Directive 2004/83/EC, they shall apply this Directive throughout their procedure.
4. Moreover, Member States may decide to apply this Directive in procedures for deciding on applications for any kind of international protection.

Article 4

Responsible authorities

1. Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with this Directive, in particular Articles 8(2) and 9.

In accordance with Article 4(4) of Regulation (EC) No 343/2003, applications for asylum made in a Member State to the authorities of another Member State carrying out immigration controls there shall be dealt with by the Member State in whose territory the application is made.

2. However, Member States may provide that another authority is responsible for the purposes of:

- (a) processing cases in which it is considered to transfer the applicant to another State according to the rules establishing criteria and mechanisms for determining which State is responsible for considering an application for asylum, until the transfer takes place or the requested State has refused to take charge of or take back the applicant;
- (b) taking a decision on the application in the light of national security provisions, provided the determining authority is consulted prior to this decision as to whether the applicant qualifies as a refugee by virtue of Directive 2004/83/EC;
- (c) conducting a preliminary examination pursuant to Article 32, provided this authority has access to the applicant's file regarding the previous application;
- (d) processing cases in the framework of the procedures provided for in Article 35(1);
- (e) refusing permission to enter in the framework of the procedure provided for in Article 35(2) to (5), subject to the conditions and as set out therein;

(f) establishing that an applicant is seeking to enter or has entered into the Member State from a safe third country pursuant to Article 36, subject to the conditions and as set out in that Article.

3. Where authorities are designated in accordance with paragraph 2, Member States shall ensure that the personnel of such authorities have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive.

Article 5

More favourable provisions

Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive.

CHAPTER II

BASIC PRINCIPLES AND GUARANTEES

Article 6

Access to the procedure

1. Member States may require that applications for asylum be made in person and/or at a designated place.
2. Member States shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf.
3. Member States may provide that an application may be made by an applicant on behalf of his/her dependants. In such cases Member States shall ensure that dependant adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

Consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependant adult is conducted.

4. Member States may determine in national legislation:

- (a) the cases in which a minor can make an application on his/her own behalf;
- (b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 17(1)(a);
- (c) the cases in which the lodging of an application for asylum is deemed to constitute also the lodging of an application for asylum for any unmarried minor.

5. Member States shall ensure that authorities likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where he/she may

make such an application and/or may require these authorities to forward the application to the competent authority.

Article 7

Right to remain in the Member State pending the examination of the application

1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.

2. Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant [6] or otherwise, or to a third country, or to international criminal courts or tribunals.

Article 8

Requirements for the examination of applications

1. Without prejudice to Article 23(4)(i), Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.

2. Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:

(a) applications are examined and decisions are taken individually, objectively and impartially;

(b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

(c) the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.

3. The authorities referred to in Chapter V shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 2(b), necessary for the fulfilment of their task.

4. Member States may provide for rules concerning the translation of documents relevant for the examination of applications.

Article 9

Requirements for a decision by the determining authority

1. Member States shall ensure that decisions on applications for asylum are given in writing.
2. Member States shall also ensure that, where an application is rejected, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.

Member States need not state the reasons for not granting refugee status in a decision where the applicant is granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC. In these cases, Member States shall ensure that the reasons for not granting refugee status are stated in the applicant's file and that the applicant has, upon request, access to his/her file.

Moreover, Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with this information at an earlier stage either in writing or by electronic means accessible to the applicant.

3. For the purposes of Article 6(3), and whenever the application is based on the same grounds, Member States may take one single decision, covering all dependants.

Article 10

Guarantees for applicants for asylum

1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants for asylum enjoy the following guarantees:

(a) they shall be informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, as well as the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2004/83/EC. This information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 11;

(b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to give these services at least when the determining authority calls upon the applicant to be interviewed as referred to in Articles 12 and 13 and appropriate communication cannot be ensured without such services. In this case and in other cases where the competent authorities call upon the applicant, these services shall be paid for out of public funds;

(c) they shall not be denied the opportunity to communicate with the UNHCR or with any other organisation working on behalf of the UNHCR in the territory of the Member State pursuant to an agreement with that Member State;

(d) they shall be given notice in reasonable time of the decision by the determining authority on their application for asylum. If a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him/her instead of to the applicant for asylum;

(e) they shall be informed of the result of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available. The information provided shall include information on how to challenge a negative decision in accordance with the provisions of Article 9(2).

2. With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants for asylum enjoy equivalent guarantees to the ones referred to in paragraph 1(b), (c) and (d) of this Article.

Article 11

Obligations of the applicants for asylum

1. Member States may impose upon applicants for asylum obligations to cooperate with the competent authorities insofar as these obligations are necessary for the processing of the application.

2. In particular, Member States may provide that:

(a) applicants for asylum are required to report to the competent authorities or to appear before them in person, either without delay or at a specified time;

(b) applicants for asylum have to hand over documents in their possession relevant to the examination of the application, such as their passports;

(c) applicants for asylum are required to inform the competent authorities of their current place of residence or address and of any changes thereof as soon as possible. Member States may provide that the applicant shall have to accept any communication at the most recent place of residence or address which he/she indicated accordingly;

(d) the competent authorities may search the applicant and the items he/she carries with him/her;

(e) the competent authorities may take a photograph of the applicant; and

(f) the competent authorities may record the applicant's oral statements, provided he/she has previously been informed thereof.

Article 12

Personal interview

1. Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview.

Member States may also give the opportunity of a personal interview to each dependant adult referred to in Article 6(3).

Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.

2. The personal interview may be omitted where:

(a) the determining authority is able to take a positive decision on the basis of evidence available; or

(b) the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application, in terms of Article 4(2) of Directive 2004/83/EC; or

(c) the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded in cases where the circumstances mentioned in Article 23(4)(a), (c), (g), (h) and (j) apply.

3. The personal interview may also be omitted where it is not reasonably practicable, in particular where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control. When in doubt, Member States may require a medical or psychological certificate.

Where the Member State does not provide the applicant with the opportunity for a personal interview pursuant to this paragraph, or where applicable, to the dependant, reasonable efforts shall be made to allow the applicant or the dependant to submit further information.

4. The absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for asylum.

5. The absence of a personal interview pursuant to paragraph 2(b) and (c) and paragraph 3 shall not adversely affect the decision of the determining authority.

6. Irrespective of Article 20(1), Member States, when deciding on the application for asylum, may take into account the fact that the applicant failed to appear for the personal interview, unless he/she had good reasons for the failure to appear.

Article 13

Requirements for a personal interview

1. A personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present.

2. A personal interview shall take place under conditions which ensure appropriate confidentiality.

3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

(a) ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so; and

(b) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate.

4. Member States may provide for rules concerning the presence of third parties at a personal interview.

5. This Article is also applicable to the meeting referred to in Article 12(2)(b).

Article 14

Status of the report of a personal interview in the procedure

1. Member States shall ensure that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant, in terms of Article 4(2) of Directive 2004/83/EC.

2. Member States shall ensure that applicants have timely access to the report of the personal interview. Where access is only granted after the decision of the determining authority, Member States shall ensure that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.

3. Member States may request the applicant's approval of the contents of the report of the personal interview.

Where an applicant refuses to approve the contents of the report, the reasons for this refusal shall be entered into the applicant's file.

The refusal of an applicant to approve the contents of the report shall not prevent the determining authority from taking a decision on his/her application.

4. This Article is also applicable to the meeting referred to in Article 12(2)(b).

Article 15

Right to legal assistance and representation

1. Member States shall allow applicants for asylum the opportunity, at their own cost, to consult in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their asylum applications.

2. In the event of a negative decision by a determining authority, Member States shall ensure that free legal assistance and/or representation be granted on request, subject to the provisions of paragraph 3.

3. Member States may provide in their national legislation that free legal assistance and/or representation is granted:

(a) only for procedures before a court or tribunal in accordance with Chapter V and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; and/or

(b) only to those who lack sufficient resources; and/or

(c) only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum; and/or

(d) only if the appeal or review is likely to succeed.

Member States shall ensure that legal assistance and/or representation granted under point (d) is not arbitrarily restricted.

4. Rules concerning the modalities for filing and processing requests for legal assistance and/or representation may be provided by Member States.

5. Member States may also:

(a) impose monetary and/or time-limits on the provision of free legal assistance and/or representation, provided that such limits do not arbitrarily restrict access to legal assistance and/or representation;

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

6. Member States may demand to be reimbursed wholly or partially for any expenses granted if and when the applicant's financial situation has improved considerably or if the decision to grant such benefits was taken on the basis of false information supplied by the applicant.

Article 16

Scope of legal assistance and representation

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, and who assists or represents an applicant for asylum under the terms of national law, shall enjoy access to such information in the applicant's file as is liable to be

examined by the authorities referred to in Chapter V, insofar as the information is relevant to the examination of the application.

Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In these cases, access to the information or sources in question shall be available to the authorities referred to in Chapter V, except where such access is precluded in cases of national security.

2. Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant for asylum has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant. Member States may only limit the possibility of visiting applicants in closed areas where such limitation is, by virtue of national legislation, objectively necessary for the security, public order or administrative management of the area, or in order to ensure an efficient examination of the application, provided that access by the legal adviser or other counsellor is not thereby severely limited or rendered impossible.

3. Member States may provide rules covering the presence of legal advisers or other counsellors at all interviews in the procedure, without prejudice to this Article or to Article 17(1)(b).

4. Member States may provide that the applicant is allowed to bring with him/her to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law.

Member States may require the presence of the applicant at the personal interview, even if he/she is represented under the terms of national law by such a legal adviser or counsellor, and may require the applicant to respond in person to the questions asked.

The absence of a legal adviser or other counsellor shall not prevent the competent authority from conducting the personal interview with the applicant.

Article 17

Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14, Member States shall:

(a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [7];

(b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where

appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview.

Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

2. Member States may refrain from appointing a representative where the unaccompanied minor:

(a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or

(b) can avail himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law to fulfil the tasks assigned above to the representative; or

(c) is married or has been married.

3. Member States may, in accordance with the laws and regulations in force on 1 December 2005, also refrain from appointing a representative where the unaccompanied minor is 16 years old or older, unless he/she is unable to pursue his/her application without a representative.

4. Member States shall ensure that:

(a) if an unaccompanied minor has a personal interview on his/her application for asylum as referred to in Articles 12, 13 and 14, that interview is conducted by a person who has the necessary knowledge of the special needs of minors;

(b) an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor.

5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum.

In cases where medical examinations are used, Member States shall ensure that:

(a) unaccompanied minors are informed prior to the examination of their application for asylum, and in a language which they may reasonably be supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;

(b) unaccompanied minors and/or their representatives consent to carry out an examination to determine the age of the minors concerned; and

(c) the decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum.

6. The best interests of the child shall be a primary consideration for Member States when implementing this Article.

Article 18

Detention

1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.

2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.

Article 19

Procedure in case of withdrawal of the application

1. Insofar as Member States provide for the possibility of explicit withdrawal of the application under national law, when an applicant for asylum explicitly withdraws his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application.

2. Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority enters a notice in the applicant's file.

Article 20

Procedure in the case of implicit withdrawal or abandonment of the application

1. When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC.

Member States may assume that the applicant has implicitly withdrawn or abandoned his/her application for asylum in particular when it is ascertained that:

(a) he/she has failed to respond to requests to provide information essential to his/her application in terms of Article 4 of Directive 2004/83/EC or has not appeared for a personal interview as provided for in Articles 12, 13 and 14, unless the applicant demonstrates within a reasonable time that his/her failure was due to circumstances beyond his control;

(b) he/she has absconded or left without authorisation the place where he/she lived or was held, without contacting the competent authority within a reasonable time, or he/she has not within a reasonable time complied with reporting duties or other obligations to communicate.

For the purposes of implementing these provisions, Member States may lay down time-limits or guidelines.

2. Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his/her case be reopened, unless the request is examined in accordance with Articles 32 and 34.

Member States may provide for a time-limit after which the applicant's case can no longer be re-opened.

Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement.

Member States may allow the determining authority to take up the examination at the stage where it was discontinued.

Article 21

The role of UNHCR

1. Member States shall allow the UNHCR:

(a) to have access to applicants for asylum, including those in detention and in airport or port transit zones;

(b) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees thereto;

(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

2. Paragraph 1 shall also apply to an organisation which is working in the territory of the Member State concerned on behalf of the UNHCR pursuant to an agreement with that Member State.

Article 22

Collection of information on individual cases

For the purposes of examining individual cases, Member States shall not:

(a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum;

(b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.

CHAPTER III

PROCEDURES AT FIRST INSTANCE

SECTION I

Article 23

Examination procedure

1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either:

(a) be informed of the delay; or

(b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.

3. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs.

4. Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:

(a) the applicant, in submitting his/her application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC; or

(b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under Directive 2004/83/EC; or

(c) the application for asylum is considered to be unfounded:

(i) because the applicant is from a safe country of origin within the meaning of Articles 29, 30 and 31, or

(ii) because the country which is not a Member State, is considered to be a safe third country for the applicant, without prejudice to Article 28(1); or

(d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision; or

(e) the applicant has filed another application for asylum stating other personal data; or

(f) the applicant has not produced information establishing with a reasonable degree of certainty his/her identity or nationality, or it is likely that, in bad faith, he/she has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or

(g) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/EC; or

(h) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin; or

(i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so; or

(j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; or

(k) the applicant has failed without good reason to comply with obligations referred to in Article 4(1) and (2) of Directive 2004/83/EC or in Articles 11(2)(a) and (b) and 20(1) of this Directive; or

(l) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry; or

(m) the applicant is a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security and public order under national law; or

(n) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation; or

(o) the application was made by an unmarried minor to whom Article 6(4)(c) applies, after the application of the parents or parent responsible for the minor has been rejected and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin.

Article 24

Specific procedures

1. Member States may provide for the following specific procedures derogating from the basic principles and guarantees of Chapter II:

(a) a preliminary examination for the purposes of processing cases considered within the framework set out in Section IV;

(b) procedures for the purposes of processing cases considered within the framework set out in Section V.

2. Member States may also provide a derogation in respect of Section VI.

SECTION II

Article 25

Inadmissible applications

1. In addition to cases in which an application is not examined in accordance with Regulation (EC) No 343/2003, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:

(a) another Member State has granted refugee status;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;

(d) the applicant is allowed to remain in the Member State concerned on some other grounds and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Directive 2004/83/EC;

(e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to point (d);

(f) the applicant has lodged an identical application after a final decision;

(g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf,

and there are no facts relating to the dependant's situation, which justify a separate application.

Article 26

The concept of first country of asylum

A country can be considered to be a first country of asylum for a particular applicant for asylum if:

- (a) he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection; or
- (b) he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement;

provided that he/she will be re-admitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Article 27(1).

Article 27

The safe third country concept

1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) the principle of non-refoulement in accordance with the Geneva Convention is respected;
- (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. The application of the safe third country concept shall be subject to rules laid down in national legislation, including:

- (a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
- (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.

3. When implementing a decision solely based on this Article, Member States shall:

(a) inform the applicant accordingly; and

(b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

4. Where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article.

SECTION III

Article 28

Unfounded applications

1. Without prejudice to Articles 19 and 20, Member States may only consider an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status pursuant to Directive 2004/83/EC.

2. In the cases mentioned in Article 23(4)(b) and in cases of unfounded applications for asylum in which any of the circumstances listed in Article 23(4)(a) and (c) to (o) apply, Member States may also consider an application as manifestly unfounded, where it is defined as such in the national legislation.

Article 29

Minimum common list of third countries regarded as safe countries of origin

1. The Council shall, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries which shall be regarded by Member States as safe countries of origin in accordance with Annex II.

2. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, amend the minimum common list by adding or removing third countries, in accordance with Annex II. The Commission shall examine any request made by the Council or by a Member State to submit a proposal to amend the minimum common list.

3. When making its proposal under paragraphs 1 or 2, the Commission shall make use of information from the Member States, its own information and, where necessary, information from UNHCR, the Council of Europe and other relevant international organisations.

4. Where the Council requests the Commission to submit a proposal for removing a third country from the minimum common list, the obligation of Member States pursuant to Article 31(2) shall be suspended with regard to this third country as of the day following the Council decision requesting such a submission.

5. Where a Member State requests the Commission to submit a proposal to the Council for removing a third country from the minimum common list, that Member State shall notify the Council in writing of the request made to the Commission. The obligation of this Member State pursuant to Article 31(2) shall be suspended with regard to the third country as of the day following the notification to the Council.

6. The European Parliament shall be informed of the suspensions under paragraphs 4 and 5.

7. The suspensions under paragraphs 4 and 5 shall end after three months, unless the Commission makes a proposal before the end of this period, to withdraw the third country from the minimum common list. The suspensions shall in any case end where the Council rejects a proposal by the Commission to withdraw the third country from the list.

8. Upon request by the Council, the Commission shall report to the European Parliament and the Council on whether the situation of a country on the minimum common list is still in conformity with Annex II. When presenting its report, the Commission may make such recommendations or proposals as it deems appropriate.

Article 30

National designation of third countries as safe countries of origin

1. Without prejudice to Article 29, Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum. This may include designation of part of a country as safe where the conditions in Annex II are fulfilled in relation to that part.

2. By derogation from paragraph 1, Member States may retain legislation in force on 1 December 2005 that allows for the national designation of third countries, other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum where they are satisfied that persons in the third countries concerned are generally neither subject to:

(a) persecution as defined in Article 9 of Directive 2004/83/EC; nor

(b) torture or inhuman or degrading treatment or punishment.

3. Member States may also retain legislation in force on 1 December 2005 that allows for the national designation of part of a country as safe, or a country or part of a country as safe for a

specified group of persons in that country, where the conditions in paragraph 2 are fulfilled in relation to that part or group.

4. In assessing whether a country is a safe country of origin in accordance with paragraphs 2 and 3, Member States shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned.

5. The assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organisations.

6. Member States shall notify to the Commission the countries that are designated as safe countries of origin in accordance with this Article.

Article 31

The safe country of origin concept

1. A third country designated as a safe country of origin in accordance with either Article 29 or 30 may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if:

(a) he/she has the nationality of that country; or

(b) he/she is a stateless person and was formerly habitually resident in that country;

and he/she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee in accordance with Directive 2004/83/EC.

2. Member States shall, in accordance with paragraph 1, consider the application for asylum as unfounded where the third country is designated as safe pursuant to Article 29.

3. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept.

SECTION IV

Article 32

Subsequent application

1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can

take into account and consider all the elements underlying the further representations or subsequent application within this framework.

2. Moreover, Member States may apply a specific procedure as referred to in paragraph 3, where a person makes a subsequent application for asylum:

(a) after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20;

(b) after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken.

3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) of this Article on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.

4. If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II.

5. Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons why a procedure has to be re-opened.

6. Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 3, 4 and 5 of this Article in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 39.

7. The procedure referred to in this Article may also be applicable in the case of a dependant who lodges an application after he/she has, in accordance with Article 6(3), consented to have his/her case be part of an application made on his/her behalf. In this case the preliminary examination referred to in paragraph 3 of this Article will consist of examining whether there are facts relating to the dependant's situation which justify a separate application.

Article 33

Failure to appear

Member States may retain or adopt the procedure provided for in Article 32 in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or appear before the competent authorities at a specified time.

Article 34

Procedural rules

1. Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 32 enjoy the guarantees provided for in Article 10(1).

2. Member States may lay down in national law rules on the preliminary examination pursuant to Article 32. Those rules may, inter alia:

(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;

(b) require submission of the new information by the applicant concerned within a time-limit after he/she obtained such information;

(c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.

The conditions shall not render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access.

3. Member States shall ensure that:

(a) the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision;

(b) if one of the situations referred to in Article 32(2) applies, the determining authority shall further examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.

SECTION V

Article 35

Border procedures

1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on applications made at such locations.

2. However, when procedures as set out in paragraph 1 do not exist, Member States may maintain, subject to the provisions of this Article and in accordance with the laws or regulations in force on 1 December 2005, procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide at the border or in transit zones as to whether applicants for asylum who have arrived and made an application for asylum at such locations, may enter their territory.

3. The procedures referred to in paragraph 2 shall ensure in particular that the persons concerned:

- (a) are allowed to remain at the border or transit zones of the Member State, without prejudice to Article 7;
- (b) are immediately informed of their rights and obligations, as described in Article 10(1)(a);
- (c) have access, if necessary, to the services of an interpreter, as described in Article 10(1)(b);
- (d) are interviewed, before the competent authority takes a decision in such procedures, in relation to their application for asylum by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 12, 13 and 14;
- (e) can consult a legal adviser or counsellor admitted or permitted as such under national law, as described in Article 15(1); and
- (f) have a representative appointed in the case of unaccompanied minors, as described in Article 17(1), unless Article 17(2) or (3) applies.

Moreover, in case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why the application for asylum is considered as unfounded or as inadmissible.

4. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 2 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this Directive.

5. In the event of particular types of arrivals, or arrivals involving a large number of third country nationals or stateless persons lodging applications for asylum at the border or in a transit zone, which makes it practically impossible to apply there the provisions of paragraph 1 or the specific procedure set out in paragraphs 2 and 3, those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

SECTION VI

Article 36

The European safe third countries concept

1. Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.

2. A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;

(b) it has in place an asylum procedure prescribed by law;

(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies; and

(d) it has been so designated by the Council in accordance with paragraph 3.

3. The Council shall, acting by qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt or amend a common list of third countries that shall be regarded as safe third countries for the purposes of paragraph 1.

4. The Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of non-refoulement under the Geneva Convention, including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law.

5. When implementing a decision solely based on this Article, the Member States concerned shall:

(a) inform the applicant accordingly; and

(b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

6. Where the safe third country does not re-admit the applicant for asylum, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

7. Member States which have designated third countries as safe countries in accordance with national legislation in force on 1 December 2005 and on the basis of the criteria in paragraph 2(a), (b) and (c), may apply paragraph 1 to these third countries until the Council has adopted the common list pursuant to paragraph 3.

CHAPTER IV

PROCEDURES FOR THE WITHDRAWAL OF REFUGEE STATUS

Article 37

Withdrawal of refugee status

Member States shall ensure that an examination to withdraw the refugee status of a particular person may commence when new elements or findings arise indicating that there are reasons to reconsider the validity of his/her refugee status.

Article 38

Procedural rules

1. Member States shall ensure that, where the competent authority is considering withdrawing the refugee status of a third country national or stateless person in accordance with Article 14 of Directive 2004/83/EC, the person concerned shall enjoy the following guarantees:

(a) to be informed in writing that the competent authority is reconsidering his or her qualification for refugee status and the reasons for such a reconsideration; and

(b) to be given the opportunity to submit, in a personal interview in accordance with Article 10(1)(b) and Articles 12, 13 and 14 or in a written statement, reasons as to why his/her refugee status should not be withdrawn.

In addition, Member States shall ensure that within the framework of such a procedure:

(c) the competent authority is able to obtain precise and up-to-date information from various sources, such as, where appropriate, from the UNHCR, as to the general situation prevailing in the countries of origin of the persons concerned; and

(d) where information on an individual case is collected for the purposes of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee whose status is under reconsideration, nor jeopardise the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.

2. Member States shall ensure that the decision of the competent authority to withdraw the refugee status is given in writing. The reasons in fact and in law shall be stated in the decision and information on how to challenge the decision shall be given in writing.

3. Once the competent authority has taken the decision to withdraw the refugee status, Article 15, paragraph 2, Article 16, paragraph 1 and Article 21 are equally applicable.

4. By derogation to paragraphs 1, 2 and 3 of this Article, Member States may decide that the refugee status shall lapse by law in case of cessation in accordance with Article 11(1)(a) to (d) of Directive 2004/83/EC or if the refugee has unequivocally renounced his/her recognition as a refugee.

CHAPTER V

APPEALS PROCEDURES

Article 39

The right to an effective remedy

1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for asylum, including a decision:

(i) to consider an application inadmissible pursuant to Article 25(2),

(ii) taken at the border or in the transit zones of a Member State as described in Article 35(1),

(iii) not to conduct an examination pursuant to Article 36;

(b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;

(c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;

(d) a decision refusing entry within the framework of the procedures provided for under Article 35(2);

(e) a decision to withdraw of refugee status pursuant to Article 38.

2. Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.

3. Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:

(a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;

(b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and

(c) the grounds for challenging a decision under Article 25(2)(c) in accordance with the methodology applied under Article 27(2)(b) and (c).

4. Member States may lay down time-limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.

5. Where an applicant has been granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC, the applicant may be considered as having an effective remedy where a court or tribunal decides that the remedy pursuant to paragraph 1 is inadmissible or unlikely to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings.

6. Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed.

CHAPTER VI

GENERAL AND FINAL PROVISIONS

Article 40

Challenge by public authorities

This Directive does not affect the possibility for public authorities of challenging the administrative and/or judicial decisions as provided for in national legislation.

Article 41

Confidentiality

Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work.

Article 42

Report

No later than 1 December 2009, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. Member States shall send the Commission all the information that is appropriate for drawing up this report. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every two years.

Article 43

Transposition

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 December 2007. Concerning Article 15, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 December 2008. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 44

Transition

Member States shall apply the laws, regulations and administrative provisions set out in Article 43 to applications for asylum lodged after 1 December 2007 and to procedures for the withdrawal of refugee status started after 1 December 2007.

Article 45

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 46

Addressees

This Directive is addressed to the Member States in conformity with the Treaty establishing the European Community.

Done at Brussels, 1 December 2005.

For the Council

The President

Ashton of Upholland

[1] OJ C 62, 27.2.2001, p. 231 and OJ C 291, 26.11.2002, p. 143.

[2] OJ C 77, 28.3.2002, p. 94.

[3] OJ C 193, 10.7.2001, p. 77. Opinion delivered following non-compulsory consultation.

[4] OJ L 304, 30.9.2004, p. 12.

[5] OJ L 50, 25.2.2003, p. 1.

[6] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

[7] OJ L 31, 6.2.2003, p. 18.

ANNEX I

Definition of "determining authority"

When implementing the provision of this Directive, Ireland may, insofar as the provisions of section 17(1) of the Refugee Act 1996 (as amended) continue to apply, consider that:

- "determining authority" provided for in Article 2(e) of this Directive shall, insofar as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee is concerned, mean the Office of the Refugee Applications Commissioner; and
- "decisions at first instance" provided for in Article 2(e) of this Directive shall include recommendations of the Refugee Applications Commissioner as to whether an applicant should or, as the case may be, should not be declared to be a refugee.

Ireland will notify the Commission of any amendments to the provisions of section 17(1) of the Refugee Act 1996 (as amended).

ANNEX II

Designation of safe countries of origin for the purposes of Articles 29 and 30(1)

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

- (a) the relevant laws and regulations of the country and the manner in which they are applied;
- (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
- (c) respect of the non-refoulement principle according to the Geneva Convention;
- (d) provision for a system of effective remedies against violations of these rights and freedoms.

ANNEX III

Definition of "applicant" or "applicant for asylum"

When implementing the provisions of this Directive Spain may, insofar as the provisions of "Ley 30/1992 de Régimen jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común" of 26 November 1992 and "Ley 29/1998 reguladora de la Jurisdicción Contencioso-Administrativa" of 13 July 1998 continue to apply, consider that, for the purposes of Chapter V, the definition of "applicant" or "applicant for asylum" in Article 2(c) of this Directive shall include "recurrente" as established in the abovementioned Acts.

A "recurrente" shall be entitled to the same guarantees as an "applicant" or an "applicant for asylum" as set out in this Directive for the purposes of exercising his/her right to an effective remedy in Chapter V.

Spain will notify the Commission of any relevant amendments to the abovementioned Act.

